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Supreme Court, U.S.
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In The

Supreme Court of the United States

P. CHARLES SCHWENDER,

Petitioner,

vs.

DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Should the Petition for a Writ of Certiorari be granted to address the issue of whether petitioner was denied due process when he was discharged as a government employee and the pretermination hearing officer was the same individual who proposed, investigated, and prosecuted the action, and that hearing officer communicated *ex parte* with the deciding official after the pretermination hearing?

2. Should the Petition for a Writ of Certiorari be granted to address the issue of whether petitioner was denied due process when he was discharged as a government employee and the pretermination "hearing" did not provide a sufficient mechanism to dispute the factual allegations of wrongdoing, particularly when the allegations involved issues of credibility?

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JURISDICTIONAL STATEMENT

The decision sought to be reviewed was rendered on April 29, 1985, by the United States Court of Appeals for the Federal Circuit. On June 25, 1985, the Chief Justice signed an Order extending petitioner's time to file a Petition for Writ of Certiorari to August 27, 1985. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. 8 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

CONSTITUTIONAL PROVISIONS

United States Constitution, Fifth Amendment

STATUTES

5 U.S.C. § 554(d)(1)
5 U.S.C. § 7513(b)(2)
5 U.S.C. § 7701(c)(1)(B)
5 U.S.C. § 7701(c)(2)(A)
5 U.S.C. § 7703(c)

REGULATIONS

5 C.F.R. § 752.404(c)(2)
5 C.F.R. § 752.404(f)
5 C.F.R. § 1201.56(c)(3)

(The foregoing constitutional provisions, statutes, and regulations are set forth in the Appendix.)

STATEMENT OF THE CASE

Petitioner, P. Charles Schwender, had been employed by the Occupational Safety and Health Administration since 1971. At the time of his removal, petitioner held the position of Safety and

Health Manager (Area Director) of OSHA's Area Office located in Albany, New York. Previously, he served as Area Director of the Agency's Buffalo Area Office.

By letter dated February 11, 1981, the Agency's New York Regional Administrator, F ger Clark, gave notice of proposed adverse action against petitioner, i.e., that he be removed from his position as Area Director of the Albany area office, and from the Federal service (App. 50-54).* The reasons given as the basis for the proposed discharge focused on erroneous entries allegedly made on a time card covering appellant's duty and/or leave status for December 11 and 12, 1980, and upon statements made in connection with these entries during an interview with Roger Clark on January 27, 1981. The charges were based in large part on Clark's written report of that interview (App. 73-76).

The agency directed petitioner's counsel to submit any written or oral reply to Clark, the same official who had investigated and proposed the charges against petitioner. Petitioner's counsel promptly protested the Agency's designation of Clark as oral reply officer (App. 55-56), but his objections were not sustained. Thereafter, petitioner proceeded through counsel to submit his written reply and to make an oral presentation before Clark, again raising a strenuous objection to the Agency's designation of the investigator of the specific charges at issue as the recipient of the oral reply (App. 55-56, 64-65, 92). At various points in the oral reply, petitioner's counsel attempted to draw attention to Clark's own misunderstandings, misinterpretations, or errors in recollection of his January 27, 1981 interview with petitioner, challenging Clark's credibility on matters central to the case against petitioner (App. 80, 82, 83-89, 98-99). The record of the oral reply hearing was forwarded for decision to the Agency's de-

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* Numbers in parenthesis preceded by "App." indicate page references to the Appendix.

ciding official, John Miles, OSHA Field Coordinator in Washington, D.C., together with petitioner's procedural objections to the proceedings up to this point.

Miles never rendered a decision on the February 11 charges. Instead, apparently through *ex parte* communications with Clark — of which petitioner was never notified, nor was he given any opportunity to respond — Miles directed a reopening of the investigation for "clarification of events" (App. 120-121). Over the continuing protests of petitioner's counsel, Clark served on petitioner an amended notice of proposed adverse action based on his further investigation of the charges, together with what were presumably intended to be affidavits of certain Agency employees, including Clark himself (App. 102-105). Petitioner's counsel declined the invitation to make a second oral reply directly before petitioner's accuser, Clark, and instead submitted an extensive written reply dated July 2, 1981, in which, in addition to answering the merits of the charges, he raised numerous procedural irregularities and errors which violated petitioner's procedural due process rights and denied petitioner a reasonable opportunity to present his defense (App. 108-124).

By decision dated July 31, 1981, the Agency's deciding official, Miles, rejected all of petitioner's claims of harmful procedural error, resolved all crucial issues of credibility in favor of Clark, and upheld the charges in their entirety (App. 5-23), thereby dismissing petitioner from government service for making errors in completing a single time card.

Petitioner timely filed an appeal from the Agency's decision with the New York Regional Office of the MSPB, and a hearing was held before Joseph K. Riotto, presiding official, on November 17 and 18, 1981. By decision dated December 21, 1981, the presiding official sustained the Agency's action (App. 24-42). A petition for review was filed with the Board on or about January 23, 1982, specifying various exceptions to the presiding official's decision, including petitioner's procedural objections to the mul-

tiple roles played by oral reply officer Clark and the extensive *ex parte* communications between Clark and the Agency's deciding official, as disclosed during the hearing before the MSPB's presiding official.

By decision dated February 23, 1984, the Board denied the petition for review (App. 43-47) and rejected petitioner's procedural objections, finding that "the agency complied with all relevant statutory and regulatory requirements . . . " (App. 43-44).

Pursuant to 5 U.S.C. § 7703, petitioner sought judicial review of the foregoing decision. By decision dated April 29, 1985, the United States Court of Appeals for the Federal Circuit affirmed the Board's decision denying review of the presiding official's decision sustaining petitioner's removal from the Department of Labor. The Court, addressing petitioner's due process arguments, found that "the Board correctly held that petitioner's allegations of procedural error were without legal basis" (App. 48-49).

POINT I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE PRETERMINATION "HEARING" FAILED TO SATISFY THE DUE PROCESS REQUIREMENTS OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In *Cleveland Board of Education v. Loudermill*, ____ U.S. ____, 105 S.Ct. 1487 (March 19, 1985), this Court held that a pretermination hearing must be accorded a public employee who can be discharged only for cause. However, the Court did not define what type of hearing was necessary to satisfy due process requirements. Rather, the Court stated that a full evidentiary hearing was not required, and — based on the relief requested by the discharged employee, and in the context of that particular case —

held that the employee is entitled to notice of the charges, an explanation of the employer's evidence and an opportunity to present his side of the story.

Unlike *Loudermill* — where the Ohio statute in question failed to provide for any pretermination notice or hearing — petitioner here was notified of the charges and a pretermination "hearing" was held. However, the hearing was constituted and conducted in a manner that was so fundamentally unfair that it denied petitioner a true opportunity to present his side of the story, thereby denying petitioner due process of law.

The pretermination "hearing" afforded to petitioner was defective in two fundamental respects which, taken together, leave no doubt that the procedure was constitutionally infirm: (1) petitioner was denied the opportunity to make his oral and written replies before an impartial Agency official, being forced instead to appear before the very individual who proposed, investigated, and prosecuted the adverse action; and (2) both Roger Clark and the Agency's deciding official admitted at the MSPB hearing that they had engaged in extensive *ex parte* communications, without giving notice to petitioner or an opportunity to be heard, during which Clark urged that the deciding official determine critical factual issues of credibility in Clark's favor, and that he disbelieve petitioner's testimony on those issues.

There can be no question that the above-described procedural errors are "harmful" within the meaning of the statute, the MSPB's implementing regulations, and case law precedents. *See* 5 U.S.C. § 7701(c)(2)(A) (1982); 5 C.F.R. § 1201.56(c)(3) (1982); *Shaw v. United States Postal Service*, 697 F.2d 1078, 1080 (Fed. Cir. 1983). As recently observed by this Court, harmful procedural error is "error that causes substantial prejudice to [an employee's] individual rights by possibly affecting the Agency's decision." *Cornelius v. Nutt*, ____ U.S. ____, ____ S.Ct. ____, 53 U.S.L.W. 4837 (June 24, 1985). Had petitioner been permitted to present his oral and written replies to a disinterested official who

could have made his recommendations to the Agency's deciding official without thereby placing his own truthfulness and credibility on the line, the outcome before the Agency may well have been different.

A. Due Process Entitled Petitioner to Appear Before an Impartial Oral Reply Officer, Not Before the Agency Official Who Proposed, Investigated and Prosecuted the Adverse Action.

The record in this case reveals beyond any question the extensive personal interest and involvement of Roger Clark in these proceedings, and indeed his persistence in seeking the removal of petitioner, based on his own investigations and conversations (more aptly characterized as "interrogations") with petitioner and other Agency employees. Clark himself initiated the adverse action based on his own covert observations of petitioner in New York City. Thereafter, he conducted an investigation to gather evidence to support his suspicions of impropriety. Clark then prepared the four specifications setting forth the reasons for the proposed removal of petitioner, two of which are based almost exclusively on so-called false statements allegedly made to Clark during his interview with petitioner on January 27, 1981. Over the strenuous objections of counsel (App. 55-56, 98-99), petitioner was required to direct his oral reply to Clark, wherein counsel in presenting petitioner's defense on crucial factual issues was placed in the untenable situation of having to attack the credibility, reliability, and recollection of statements made by the oral reply officer himself! Clark, too, was in an untenable position, requiring him to make recommendations to the ultimate decision maker on questions of fact turning on his own credibility and reliability as a witness to the crucial events.

Clark's involvement, already too extensive to guarantee his continued impartiality, did not stop there, however. Apparently at the insistence of the deciding official, Clark proceeded to take

advantage of the disclosure of petitioner's defenses made to him at the oral reply to conduct a further investigation, and to amend the charges and specifications so as to shore up weaknesses in the Agency's case against petitioner. Again, over petitioner's objections (App. 118-121, 122-124), Clark was designated as the oral reply officer to hear petitioner's response to the latest specifications, but counsel for petitioner declined the invitation to participate in yet another exercise in futility and submitted only a written response to the amended charges.

The foregoing proceedings were plainly improper and destroyed the very purpose behind the requirement of an oral reply. As the Court of Claims stated in *Washington v. United States*, 147 F.Supp. 284 (Ct.Cl.), *cert. dismissed*, 355 U.S. 801 (1957), Congress in granting the right to an oral reply must have intended that the employee have a chance of success in establishing matters in defense or mitigation. "The naked facts, without the personal appeal, could be just as well stated in writing." 147 F.Supp. at 288. Because of Clark's involvement as complaining witness, investigator, and prosecutor, it is clear that petitioner had no chance of success whatsoever in establishing his factual defenses at the oral reply.

The case of *Paterson v. United States*, 319 F.2d 882 (Ct.Cl. 1963), constitutes direct authority that the agency's procedures undermined the fundamental fairness of the pretermination reply. The employee in *Paterson* had been interviewed by two postal inspectors, who later investigated and prepared the charges against him. His request to make a personal appeal to his operations supervisor was denied, and he was allowed only to make an appearance before the two inspectors. The Court of Claims overturned his dismissal, holding that the right to a personal appeal "is not met by an appearance before investigators charged with the duty to develop the facts to substantiate the charges they, themselves, have drawn up", 319 F.2d at 884, particularly where they were not supervisors of the employee being charged. The

Court could think of "no surer way to destroy the intended effect of the personal appeal" than to have the investigator himself draw up charges, comment on the employee's answer to the charges, and then conduct the oral reply afforded the employee under the statute. *Id.*, 319 F.2d at 885. That is precisely what happened in this case, albeit the investigator and primary witness against petitioner also happened to be his superior in the Agency chain of command.

The fact that Clark was petitioner's superior in no way mitigates the unfairness of his multiple roles in this proceeding. Several years after the decision in Paterson, the Court of Claims criticized as "questionable", in a case involving the discharge of an employee on the grounds of "making malicious statements against his immediate superior", the fact that the immediate superior himself had signed the notice as charging party and had phrased the accompanying letter in first-person terms. "In a case involving the writer's personal interests so directly and strongly, this was an insensitive practice which could better have been avoided. Cf. *Offutt v. United States*, 348 U.S. 11 (1954). Perhaps if another official had had the responsibility of deciding whether to proceed formally against plaintiff, and of framing the notice of charges, this matter would have taken a different course." *Burkett v. United States*, 402 F.2d 1002 (Ct.Cl. 1968). Certainly the same must be said of this proceeding, in which Clark, with an obvious and significant personal interest in the outcome, not only made the initial decision to proceed against petitioner and framed the notice of charges, but sat to hear petitioner's oral reply, amended the charges as a result of further investigation to meet matters contained in petitioner's defense, and transmitted the record to John Miles together with Clark's *ex parte* credibility recommendations. The inference of prejudicial bias against petitioner is compelling.

While the decisions in *Paterson* and *Burkett* rested primarily on statutory grounds, the requirement of an impartial decision

maker has constitutional underpinnings. It is well established that the probability of bias on the part of a decision maker may be too great to be constitutionally tolerable, when he has been the target of criticism by the party before him. *Taylor v. Hayes*, 418 U.S. 488, 501-03 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Pickering v. Board of Education*, 391 U.S. 563, 578-579 n. 2 (1968). In this case, Clark's credibility and even his reputation for integrity and truthfulness were, of necessity, impugned by petitioner in the course of relating his own version of the conversations with Clark which underlie the charges. With his personal integrity at stake, Clark was in no position to hear petitioner's oral reply and objectively assess this case for recommendation to the decision maker. See *Arnett v. Kennedy*, 416 U.S. 134, 196-200 (dissenting opinion of Justice White).

Clearly, Mr. Clark should not have been permitted to act as complaining witness, investigator, and prosecutor of petitioner, without the Agency designating someone else to act in the impartial role of oral reply officer. This departure from the statutory mandate violates the constitutional principles set forth in *In re Murchison*, 349 U.S. 133 (1955). There the Supreme Court struck down the contempt convictions of witnesses who had refused to answer questions during an interrogation by a "one-man grand jury", and who were subsequently tried in open court before the same individual acting as a judge. The Court held that trial before the judge who was at the same time the "complainant, indicter and prosecutor" violated the due process requirement of an impartial tribunal. Having taken an active part in the accusatory process, the judge could no longer be wholly disinterested in the conviction or acquittal of those accused. Furthermore, the Court relied heavily on the fact that at the contempt trial, "the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room" when he had conducted his interrogation of the witnesses.

The dual or perhaps triple role of the trial judge presented the astonishing spectacle of the judge himself "presenting testimony upon which he must finally pass in determining the guilt or innocence" of the accused. *Id.*, 249 U.S. at 139.

Such is precisely the spectacle which these administrative proceedings present and which has resulted in irreparable prejudice to petitioner. See *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (requirements of due process were not met by the review of a welfare termination decision by the caseworker who was, in effect, also the complainant); *Morrisey v. Brewer*, 408 U.S. 471, 486 (1972) (an independent decision maker must determine whether reasonable grounds exist for parole revocation because the "officer directly involved in making recommendations cannot always have complete objectivity in evaluating them"). Permitting Clark to act as oral reply officer when the charges were investigated and specifications drawn up by him, and particularly when they were based largely on "false statements" revealed as such only by Clark's own version of his conversations with petitioner, was a serious breach of due process warranting correction by this Court.

B. The Oral Reply Officer's Recommendations to the Deciding Official Constituted Improper *Ex Parte* Communications By a "Non-Disinterested Adversary" of Petitioner.

It has been held that "the purpose of an oral reply . . . would be thwarted absent a power of meaningful recommendation of disposition vested in the individual who personally meets with the employee." *Polcover v. Secretary of the Treasury*, 477 F.2d 1223, 1236 (D.C. Cir.), *cert. denied*, 414 U.S. 1001 (1973).

Because of Clark's extensive personal involvement in the Agency proceedings, any "recommendations" he may have made to Miles were, in a very real sense, *ex parte* communications to the decision maker by an adversary without affording petitioner the necessary opportunity to reply. Cf. Administrative Procedure

Act, 5 U.S.C. 8 554(d)(1) ("The employee who presides at the reception of evidence . . . may not consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate"). Clark's "recommendations" amounted to nothing less than "self-serving contact[s] initiated by an interested party to add to its factual evidence or to proffer further justification for its actions after the record should have been closed." *Doe v. Hampton*, 566 F.2d 265, 276 (D.C. Cir. 1977). It was manifestly improper, therefore, for Clark to have communicated privately with Miles concerning the crucial factual issues upon which his own credibility and truthfulness vis-a-vis petitioner's would be determined.* Not surprisingly, these credibility issues were without exception resolved in Clark's favor. The Agency's pretermination decision was thus the product of a grave impairment of petitioner's due process rights.

Clark and Miles freely admitted on cross examination that they had engaged in extensive *ex parte* discussions of the evidence supporting the charges against petitioner from the outset of the Agency's removal proceedings. In January 1981, Clark telephoned Miles to advise him that he would be visiting the Albany Area Office to investigate a case involving the Area Director (App. 135-136). Prior to Clark's actual preparation of the proposed adverse action, he again discussed his investigation with Miles (App. 125, 136-137). After receiving petitioner's oral reply and written response, Clark made his initial recommendation to Miles, in which he urged the deciding official to credit Clark's version of his January 27, 1981 conversation with petitioner and to disbelieve petitioner's recollection:

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* The fact that Clark was legally disabled from making any meaningful recommendation to the Agency's deciding official only confirms once more that he was not a proper official to receive the oral reply. The Agency's dilemma is self-imposed, because the duty to receive the oral reply and make a meaningful recommendation could have been delegated by Clark to a subordinate "line" or "staff" officer. See *Ricucci v. United States*, 425 F.2d 1252, 1255-56 (Ct. Cl. 1970).

> "[It] was quite clear to me that [petitioner] told me that he should have been on annual leave, and I saw nothing other than a changing of that story, saw nothing other than a fabrication in the case." (App. 121-122).*

Acknowledging the evident weaknesses in the Agency's case — conveniently pointed out to Clark in petitioner's oral reply and written response (App. 140) — Miles directed Clark to obtain affidavits from several employees in the Albany Area Office and to prepare a second set of reasons and specifications in support of the proposed adverse action (App. 138-140).

On cross examination, Clark testified that he discussed his original recommendations with Miles "at length," "in detail," and "back and forth" — although he provided no specifics as to their conversations (App. 127-130). After petitioner had submitted his written response to the second set of specifications, Clark again had "several different conversations" with Miles during which he recommended, as before, that the charges against petitioner be sustained (App. 130-131).

Significantly, Clark had no recollection of discussing with Miles a number of factual conflicts in the employees' statements that tended to support petitioner's recollection of events (App. 133-134); nor could he recollect advising Miles that petitioner had indeed mentioned his dental problems to Clark during their conversation in the Albany Area Office on January 27, 1981 (App. 132-134); nor could he recollect advising Miles of the circumstances surrounding petitioner's purchase of an airline ticket from New York to Buffalo on December 5, 1980 (App. 133-134); nor could he recollect discussing with Miles the time period that had

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* Although Miles was thus advised that the charges involved a credibility determination as between petitioner and Clark, Miles testified that he saw no reason to appoint someone other than Clark as oral reply officer, because Clark "was taking the response, to hear the case as my representative . . . [T]o me it was as if I was there" (App. 137-138). Of course, it was not "as if [Miles] was there," since Clark, unlike Miles, had a direct personal interest in the deciding official's resolution of credibility issues.

elapsed between petitioner's discussion of the amended time card with his timekeeper and petitioner's signing of the time card (App. 132-133). These omissions are not surprising, given the role Clark played in the proceedings, and given the natural human tendency to seek to discredit the truthfulness of one's adversary; but they proved to be extremely prejudicial to petitioner, since their omission not only influenced the deciding official's assessment of petitioner's credibility, but also led to several plainly erroneous factual findings for which there was no supporting evidence — substantial or otherwise — in the record before the deciding official.

Under the case law precedents of the Court of Appeals for the Federal Circuit and of its predecessor, the Court of Claims, the foregoing harmful *ex parte* communications between the Agency's presiding official and petitioner's adversary violated petitioner's due process rights and rendered the Agency's removal proceedings against him constitutionally invalid.

In *Sullivan v. Department of the Navy*, 720 F.2d 1266 (Fed. Cir. 1983), the Federal Circuit Court of Appeals overturned a decision of the agency that removed the petitioner from his position on grounds that he had submitted false time sheets on six specified dates. The Court held that improper *ex parte* communications made to the agency's deciding official by petitioner's superior, who had initiated the investigation, were "not only unfair, but also denied petitioner his rights under the due process clause of the Constitution"; and that these improper contacts "tainted the investigation, voided the entire proceeding, and rendered [the agency's] decision a nullity." 720 F.2d at 1274. The petitioner was ordered reinstated to his position with full back pay and benefits.

The facts in *Sullivan* closely parallel this case. The commanding officer of petitioner's agency, Captain Westbrock, had commenced an investigation into possible discrepancies between the petitioner's time sheets and his actual hours worked. Having decided to bring charges against petitioner for filing false claims,

Westbrock delegated the actual preparation of the charges to a subordinate. Westbrock continued "actively participating in the case up to and including the day of the hearing on petitioner's oral and written response to the charges," 720 F.2d at 1269, by hearing and deciding various motions presented by the petitioner.

In *Sullivan*, however, a different official was appointed by the agency to hear petitioner's oral response to the charges. Here, the Agency was so oblivious to the standards of due process that it appointed petitioner's adversary, Roger Clark, as the official to receive petitioner's oral and written replies. This would be analogous to having Westbrock hear the petitioner's oral reply in *Sullivan*, thus compounding the procedural error present in this case.

After the recommendation of the oral reply officer had been forwarded to the deciding official, Westbrock repeatedly communicated with the deciding official (and his aides) to urge that petitioner be removed. The deciding official ordered the petitioner's removal, whereupon petitioner unsuccessfully appealed to the Field Office of the Merit Systems Protection Board, which held a full adversary hearing, and thence to the Board in Washington, which denied the petition for review.

The *Sullivan* decision is, in all material respects, indistinguishable from this case. If anything, the conduct of Agency officials throughout this proceeding demonstrates a more serious breach of the standards of due process and a more compelling case for relief than *Sullivan*. In both cases, *ex parte* communications were made to the Agency's deciding official — prior to any evidentiary hearing — by a superior official shown to be petitioner's adversary, thereby tainting the removal proceedings with unfairness and vitiating petitioner's removal. The decision of the Federal Circuit in this case is plainly in conflict with its holding in *Sullivan* and with the cases relied on in that decision.

In *Sullivan*, the respondent argued that even if the *ex parte* communications were improper, their occurrence constituted

mere harmless error because the petitioner had the opportunity to present the issue, in the context of a full adversary hearing, to the Merit Systems Protection Board on appeal. The Federal Circuit decisively rejected this argument, pointing out that the error is committed when *ex parte* statements are made to the first official with authority to decide the case in favor of the employee.

The Federal Circuit in *Sullivan* also rejected the respondent's argument that improper *ex parte* communications to the deciding official made "absolutely no difference" because the evidence supported the petitioner's removal in any event, regardless of the tainted communications. The Court held that due to the seriousness of such a procedural defect, the substantive merits of the adverse action are to be wholly disregarded.

Similarly, in *Camero v. United States*, 375 F.2d 777 (Ct.Cl. 1967), the Court of Claims found that *ex parte* communications to the decision maker by a person with "more than a neutral stake" in the outcome of an adverse action were inconsistent with the standards of fairness implicit in the agency's hearing procedures. The same result was reached in a previous case before the Court of Claims, *Ryder v. United States*, 585 F.2d 482 (Ct. Cl. 1978), which involved *ex parte* communications to the decision maker from an important witness against the plaintiff. The Court of Claims struck down the plaintiff's removal as violative of the principles of due process applied in *Camero*.

Sullivan and the other cases cited above are squarely applicable to this case. The Merit Systems Protection Board's assertion that Clark was not a "non-disinterested adversary," (App. 43-44), thereby supposedly distinguishing the Sullivan case, is remarkably naive. Clark's credibility vis-a-vis petitioner's lies at the very heart of the charges against petitioner. Indeed, if only because Clark has an obvious and compelling personal interest in having his own testimony credited and petitioner's testimony discredited, his role is far more "adversarial" than the employee's superior in

Sullivan (who initiated the investigation against the petitioner and recommended that charges be brought against him, but who did not prepare the charges or testify against the petitioner himself).

In summary, these cases teach that an employee facing removal from government service is entitled to have the Agency's deciding official decide the case without the taint of improper *ex parte* communications. The analysis is a constitutional one, and the rights protected are implicit in the concept of procedural due process.

This Court, in the *Loudermill* case, reaffirmed that due process requires the government to afford a hearing to an employee prior to his removal. Here, however, the pretermination "hearing" was constituted and conducted in such a manner that the due process right to present the employee's side of the story was stripped of all meaning, thereby rendering petitioner's written and oral replies nothing more than an exercise in futility.

While the Court has held that the pretermination hearing need not be elaborate, it must still comport with the fundamental principles of fairness. Whether the pretermination "hearing" in this case complied with minimum procedural due process requirements is an issue not presented in *Loudermill* and one that, obviously, will continue to recur in employment discharge cases. The Court is respectfully urged to grant the Petition for Writ of Certiorari to consider this important constitutional issue.

POINT II

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS AN IMPORTANT ISSUE NOT DECIDED BY THE COURT IN *CLEVELAND BOARD OF EDUCATION V. LOUDERMILL*.

The Court's decision in *Loudermill*, that a pretermination hearing must be accorded a public employee who can be discharged only for cause, established a basic due process founda-

tion in tenured public employment discharge cases. However, the decision was limited by the facts of that case. There, Loudermill was hired as a security guard and, as part of his job application, stated that he had never been convicted of a felony. Upon discovering that the statement was not true, the Board summarily dismissed Loudermill because of his dishonesty in completing the employment application. Loudermill did not dispute the fact that he had been convicted of a felony, but argued that he was entitled to a hearing prior to termination where he would have explained that he thought his conviction was for a misdemeanor. The Court agreed that some type of hearing was required to permit the employee to proffer his explanation. Since no hearing was conducted, the Court had no opportunity to evaluate its fairness, nor was it called upon to formulate a more precise standard with respect to the pretermination hearing.

Both Justice Brennan, concurring and dissenting, and Justice Rehnquist, dissenting, noted that the Court's opinion set forth no definite standards for the conduct of a pretermination hearing. ___ U.S. ___, ___, ___, 105 S.Ct. 1487, 1499, 1504. Justice Brennan further noted that *Loudermill*, and its companion case, did not involve *factual* disputes, but rather whether the employees were entitled to an opportunity to present a plausible argument to prevent their discharge. Justice Brennan reasoned that "when factual disputes are involved . . . an employee may deserve a fair opportunity before discharge to produce contrary records or testimony, or even to confront an accuser *in front of the decision maker.*" ___ U.S. ___, ___, 105 S.Ct. at 1499 (emphasis supplied). This Court in *Matthews v. Eldridge*, 424 U.S. 319 (1976), recognized that a factor in evaluating the fairness of a pretermination proceeding is whether the inquiry focuses on objective facts or on the credibility and veracity of witnesses. *Id.* at 343-344. The D.C. Circuit Court of Appeals has observed that due process may require more than a mere "opportunity to explain" where there is a factual dispute in an employment dis-

charge case. *Wehner v. Levi*, 562 F.2d 1276, 1279, n.8 (D.C. Cir. 1977). Similarly, the Fifth Circuit Court of Appeals has held that due process requires an opportunity "to respond orally *before the official charged with the responsibility of making the termination decision.*" *Thurston v. Dekle*, 531 F.2d 1264, 1273 (5th Cir. 1976) (emphasis supplied).

Here, petitioner disputed the alleged facts underlying the proposal to discharge him from employment. The decision maker, who was not in attendance at the pretermination hearing, made factual determinations and resolved crucial issues of credibility against petitioner, all without petitioner being afforded a meaningful opportunity to present his side of the story directly to the decision maker.

Indeed, one of the factors the deciding official utilized to determine petitioner's credibility was the fact that he purchased an airline ticket from New York City to Buffalo (his residence) instead of Albany (his place of work), thereby evincing a prior intent to be absent from work the day of his sick leave (App. 13-14). However, at the post-discharge hearing, petitioner explained that he had purchased a New York City to Buffalo air ticket for the Friday in question because he was unsure whether he would be returning to Albany or Buffalo, and he took the Buffalo tickets because flights to that city were more likely to be filled to capacity, whereas if he decided to go to Albany, it would be easy to switch tickets. This explanation was supported by the testimony of an airline ticket agent who sold petitioner his tickets, and she stated that she advised him to make that type of travel arrangement (App. 30-31).

This one example demonstrates the inherent due process problems, and the danger of a wrongful discharge, when an employee is not granted a meaningful opportunity to present his defenses directly to the deciding official, especially when the allegations of wrongdoing involve issues of fact and credibility. The record of this case abounds with other similar examples, all resulting from

the Agency's insistence on placing petitioner's adversary, Roger Clark, in the role of intermediary between petitioner and the deciding official.

The Court should grant the Petition for a Writ of Certiorari to review the Agency's patent violation of petitioner's procedural due process rights. Furthermore, the Petition should be granted because the case at bar presents an excellent opportunity for the Court to address the issue, not presented in *Loudermill*, of the precise procedural standards applicable with respect to the conduct of a pretermination hearing when matters of fact and credibility are in dispute. Granting the Petition will enable the Court to provide needed guidance to the lower courts by more fully addressing the procedural due process issues inherent in tenured public employment discharge cases. The Court's decision will thus prevent the continued recurrence of this type of case, as predicted by Justice Rehnquist in his dissent in *Loudermill*, and will prevent needless litigation of other similar claims.

CONCLUSION

For all the foregoing reasons, the Court is respectfully requested to grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit.

Dated: Buffalo, New York
August 21, 1985

Respectfully submitted,

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85-346 (2)

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

P. CHARLES SCHWENDER,

Petitioner,

vs.

DEPARTMENT OF LABOR,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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STATUTES

5 U.S.C. § 554

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

5 U.S.C. § 7513

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

5 U.S.C. § 7701

(c) (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (2) of this section if the employee or applicant for employment —

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

5 U.S.C. § 7703

(c) In any case filed in the United States Court of Claims or a United States court of appeals, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

REGULATIONS

5 C.F.R. § 752.404

(c) Employee's answer.

(2) The agency shall designate an official to hear the employee's oral answer who has authority either to make or recommend a final decision on the proposed adverse action. The right to answer orally in person does not include the right to a formal hearing with examination of witnesses unless the agency provides one in its regulations in accordance with paragraph (g) of this section.

5 C.F.R. § 752.404

(f) Agency decision. In arriving at its written decision, the agency shall consider only the reasons specified in the notice of proposed action and shall consider any answer of the employee and/or his or her representative made to a designated official. The agency shall deliver the notice of decision to the employee at or before the time of action will be effective. The notice shall tell the employee of his or her appeal rights.

5 C.F.R. § 1201.56

(c) Definitions. For purposes of this section, the following definitions shall apply:

(3) Harmful error: Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

CONSTITUTIONAL PROVISIONS

AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[U.S. Department of Labor
Occupational Safety and Health Administration
Washington, D.C. 20210
Reply to the Attention of:]

July 31, 1981

Mr. P. Charles Schwender
105 Chapel Wood
Williamsville, New York 14221

Dear Mr. Schwender:

In a letter dated February 11, 1981, New York Regional Administrator, Roger Clark, proposed that you be removed from your position of Safety and Health Manager, GS-0018-14, and the Federal service in order to promote the efficiency of the service. You and your representative submitted oral and written replies on March 24, 1981. On May 29, 1981, Mr. Clark sent you a letter amending two of the original charges. You were given a new thirty day notice period and were informed of your right to make an oral and or written reply to that letter and enclosures. Your written reply was dated July 2, 1981. No oral reply was requested.

In accordance with Part 752 of the Office of Personnel Management regulations and the Department of Labor Supplements to Part 752, this is a notice of my decision in this matter. After full review of the record and careful consideration of your oral and written replies to the proposed adverse action, my decision in this matter follows:

Reason 1: You falsified an amended time card covering your duty status on December 11 and 12, 1980.

Specification 1: You initialled and signed an amended timecard showing yourself in a work status on December 11, 1980, when you were not actually performing duties related to your position. You told me on January 27, 1981, in a meeting in the Al-

bany Area Office, that the reflection of eight hours work status on December 11 was a mistake, and that the time on December 11, 1980, should have been charged to annual leave. This is a violation of the DOL Code of Ethics and Conduct, Appendix A(k) in that you made a false statement in a Government matter on the amended timecard.

Findings: In your oral and written replies of March 24, 1981, your representative stated that on December 15, 1980, you had told the Albany Area Office timekeeper to prepare an amended timecard for you reflecting a charge of eight hours of annual leave for December 11, 1980. He stated that you had received your amended timecard

[-1-]

[-2-]

along with five others for your employees and quickly initialled and signed your own card. You were expecting to see two charges to leave on the amended timecard (presumably, charges for Thursday, December 11 and Friday, December 12). When you received the card, there were two charges to leave, which you initialled, and then signed off on the card. One charge was for Friday, December 12; however, the other charge was for one hour of sick leave you used on Monday, December 1. Your representative stated that not realizing that a charge to leave for December 11 was not made on the amended timecard was simply an oversight, on your part and on the part of the timekeeper. You had expected to see only two charges for December 11 and 12 (initially forgetting your charge to leave on December 1) and you saw and initialled two charges; in your haste neglecting to note that the two amendments you were initialling were not for the two dates involved.

I do not find your replies and rationales submitted on March 24, 1981, credible when viewed within the pertinent context the physical layout of the timecards. I note that your amended timecard

(Schwender Exhibit D) contains your initials in two places. The first charge to leave on Monday, December 1, required you to initial the card on the second line from the very top of the column where employees initial charges for leave. The second charge to leave on Friday, December 12, required you to initial the card at the second line from the very bottom of the same column. Your initials are physically separated by a substantial gridwork of ten interspersing lines/boxes in the column. You have been a supervisor and Area Director for a long time; it is reasonable to state that you have had ample opportunity to be familiar with the layout and handling of timecards. Familiar enough to realize that for the two charges to leave you had expected and just minutes before had discussed with the timekeeper, i.e., charges for the last two consecutive days of the pay period would have appeared one directly on top of the other and required two sets of your initials placed near the bottom of the card's column for initials, not widely interspaced.

In your oral and written replies of March 24 you hold that Ms. Joos did not ask you about your leave status for December 11 and 12. I find that this is upheld by Ms. Joos' statement of March 16, 1981, that was attached as Exhibit B to your written reply; however, the specification did not state that she had asked you directly. The timekeeper actually requested the information, working in concert with Ms. Joos, her first line supervisor. Ms. Joos statement of March 16, 1981:

> "On 12/15/80, the timekeeper asked me if I knew what your duty status was for 12/11 and 12/12. I related to her what you had told me on 12/5, but I instructed the timekeeper to ask you personally what your duty status was for 12/11 and 12/12, so as to be absolutely correct when submitting the amended time card. The timekeeper then went in to your office to ascertain the correct information. I was not the recipient of your instructions, and have never claimed to be. The timekeeper received instructions from you."

This statement, submitted with your written reply, clearly indicates that your staff, the SOMA and timekeepr, knew that there was some question concerning your leave status for December 11 and 12. Specifically, Ms. Joos, "instructed the timekeeper to ask you personally what your duty status was for 12/11 and 12/12, so as to be absolutely correct when submitting the amended time card. The timekeeper then went into your office to ascertain the correct information." I do not find credible your representation that the timekeeper, after specifically asking you your status because there was already some question of your status in the mind of the SOMA and herself, and after being told to ask you personally in order to be "absolutely correct in submitting the amended time card", would then forget to make one of the two entries specifically brought to her attention. Additionally, Ms. Joos told Mr. Clark on January 27, 1981 that with regard to December 11, "Nothing was said regarding Thursday." While Ms. Joos was not the person who directly asked you about the two days in question, she was involved in working with the timekeeper to accomplish completion of the amended time cards. Furthermore, while it is understandable that you were busy on the day you signed employee timecards, and may have done so in a hurried or perfunctory fashion, I do not find it credible that your failure to catch the omission of the December 11 entry was unintentional.

The above findings, based up to now only on the record dated March 24, 1981, the date of your first oral and written replies, and before, are further supported by the sworn statements of May 5, 1981, from Ms. Mary Patricia Joos and Ms. Darlene Burdick, the Albany Area Office timekeeper. Both subordinate employees, the timekeeper Ms. Burdick, who spoke to you directly, and her supervisor Ms. Joos, did go to specific efforts to ascertain your leave status for December 8 through 12, 1980. Both people reported the same general information i.e., Ms. Burdick stated that when she spoke to you to clarify your leave status for December 11 and 12, she asked you if you had taken any leave during the week

of December 8-12, you told her to show eight hours of sick leave for Friday, December 12 and you did not mention Thursday December 11. Ms Joos' statement of May 5, 1981, indicates that she overheard the December 15, 1980, conversation between you and Ms. Burdick concerning your leave status for the week of December 8 through 12, and that you instructed Ms. Burdick to amend your timecard to show eight hours of sick leave for December 12 and that no time should be charged for December 11. Ms. Joos stated that Ms. Burdick discussed your instructions with Ms. Joos and confirmed the information Ms. Joos had overheard.

In your written reply of July 2, 1981, page 4, it is stated:

> "In summary, Respondent's discussion with Ms. Burdick concerned charges for leave during the week of December 8th through December 12th. He responded in the affirmative, referring to annual leave for December 11th. He then differentiated and specifically referred to sick leave on December 12th."

[-4-]

Ms. Burdick had been sent to you in order that the amended timecard be absolutely correct, since neither she nor Ms. Joos was sure of your leave usage for the week of December 8 through 12. Ms. Joos stated that Ms. Burdick confirmed what Ms. Joos had overheard to the effect that there would be no charge made to annual leave on December 11. Both of the clerical people could confirm what each understood; I find greater credibility in the events described and statements made by Ms. Joos and Ms. Burdick than those described in your written reply of July 2, 1981.

In your oral and written replies of March 24 you indicate that you contacted or attempted to contact an employee of the DOL Solicitor's office while in New York. In your written reply of July 2, a statement from the attorney in the Solicitor's office indicates that you attempted or did actually contact him on December 11 or 12, 1980. However, a phone call, made or completed on either day would not place you in a duty status.

That you did not indicate to your staff responsible for completing the amended timecards on December 15 that annual leave should have been charged for December 11 is fully credible to me. Your failure to note that missing charge to annual leave for December 11 described by you as a clerical error in documenting your timecard is not as credible as the statements, both the statement from Ms. Joos that you submitted with your March 24 written reply (exhibit B) and the sworn statements of Ms. Joos and Ms. Burdick made on May 5 which indicate to me that the preponderance of the evidence supports this specification that you made a false statement in a Government matter in failing to charge annual leave for December 11, 1980 by way of an amended timecard initialled and signed by you on December 15, 1980. Therefore, I find specification 1 of reason 1 sustained.

Reason I, Specification 2: You initialled and signed an amended timecard showing yourself on sick leave December 12, 1980. You indicated to members of your staff you had a dentist appointment for that day, but later told me on January 27, 1981, in a meeting in the Albany Area Office, that that was not correct, that the time for December 12, 1980, should have been charged to annual leave. This is also a violation of the DOL Code of Ethics and Conduct, Appendix A(k) in that you made a false statement in a Government matter.

Findings: In your oral and written replies of March 24, 1981, your attorney states that you were properly on sick leave for December 12, 1980 and emphatically denies that you told Mr. Clark on January 27, 1981, that the sick leave charge for time on December 12 was not correct, but should have been a charge to annual leave.

In the March 24 oral reply, pages 7 and 8, your attorney states:

"On December 12th after Mr. Schwender had completed a call with one of the solicitors in the OSHA Regional Office, he determined that because of the pain and what he had been ad-

vised by the doctor that it would be useless to fly back to Albany, to his dentist, where the dental work was being done, because he did not expect the dentist to be able to continue with the work necessary on the bridge because of the pain he was experiencing at that point and it would be necessary to then fly back to Buffalo which is his residence, and as you know, he resides in the Buffalo area and is commuting to the Albany location. So rather than fly back to Albany, Mr. Schwender took the first available flight to Buffalo which left somewhere around 1:00 o'clock in the afternoon."

[-5-]

In the March 24 written reply, page 10, your attorney states:

"Respondent began to suffer some discomfort on Wednesday, December 10, 1980. This discomfort continued on Thursday, December 11. As a result of the discomfort, Respondent elected to avoid further dental work on December 12, 1980. Rather, Respondent chose to return home, take medication for the discomfort, and have dental work continued when the pain subsided."

Attached to your written reply of March 24 is Exhibit J, a xerox of your customer copy of your airline ticket documenting your trip to Buffalo on December 12, 1980. I note that the issue date of this airline ticket is December 5, 1980 — a date prior to the onset of discomfort on December 10, referenced in your written reply. I also note that the destination of the ticket, issued on December 5, 1980, is Buffalo, not Albany.

In your written and oral reply of March 24, a number of times your representative repeatedly states that your statements of January 27, 1981, to Mr. Clark were misunderstood and misrepresented. I do not find these assertions credible in that the record indicates some intentions on or before December 5 that you would go from NYC to Buffalo on Friday, December 12, 1980. There is no evidence in the Mr. Clark's report that you indicated at any time in the January 27, 1981, meeting that you were experiencing

discomfort on December 12, even though your representative presented a detailed history of the discomfort suffered by you on December 10, 11 and 12. The information provided January 27, 1981 concerning the sick leave charge has been indicated that you told Mr. Clark it was incorrect and should have been a charge to annual leave. It appears that you changed your position on the matter in your oral and written replies of March 24, 1981. Again I find an issue of credibility. The report/statement of Mr. Clark noting that you had told him on January 27, 1981, that the charge to sick leave was not correct and that it should have been a charge to annual leave coupled with your airline reservation issued on December 5, 1980, listing the destination of Buffalo is more credible than the information contained in your oral and written replies, both those of March 24 and July 2, 1981. I find based on the overall record that you did, in fact, make a false statement in claiming sick leave for December 12, 1980.

I find a degree of relevant evidence that reasonably, when considering the record as a whole, is acceptable to me as sufficient to support my conclusion that it is more likely to be true than not true that you did, in fact, falsify an amended time cared covering your duty status on December 11 and 12, 1980, and therefore, I find reason 1 of the proposed adverse action sustained.

Concerning the specifications contained in Mr. Clark's letter of May 29, 1981, amending the proposed adverse action of February 11, 1981, your representative has brought up a number of issues. One issue is that the May 29 letter contained new charges. My review of the file is that the amendment did not contain new charges; the letter amending the charges speaks to the same basic issues and situations addressed previously, i.e., what specifically happened on December 15, 1980, relative to your actions documenting the amended timecard for the dates of December 11 and 12, 1980? In the oral and written replies of March 24, 1981, your representative stated a number of times facts in direct opposition to the facts developed upon which the action was proposed.

In this situation, two things are indicated: either information upon which the Agency acted in bringing the charges was incorrect or there is an issue of credibility. Your attorney repeatedly asserted that Mr. Clark has misunderstood and extensively misrepresented his discussion on January 27, 1981, with you. Mr. Putrino emphatically and repeatedly stated that you did *not* tell Mr. Clark on January 27, 1981, that the sick leave charge on December 12 was incorrect and should have been a charge to annual leave; since you and your representative strongly assert that you did not make the statement reported by Mr. Clark, it flows that the bulk of the information in his Report and charges of February 11, 1981 were evidence of extensive misrepresentation and misunderstanding.

From the record developed by way of the February 11, 1981, proposed adverse action and your oral and written replies of March 24, a reasonable person would have a basis to suspect that the Agency was wrong (and that issue should be cleared) or that your own credibility and that of Mr. Clark should be explored. I reiterate that the record containing your oral and written replies of March 24 did contain some information that called your credibility into question. Note that in your oral and written replies of March 24, there exists information that brings into question your intended activity on December 12. On December 5, an airline ticket was issued to you for you trip to the Area Directors meeting in New York City (December 8 through 10). On that ticket and at that time, December 5, the reservations were made for a midday flight to Buffalo, your place of residence, not Albany, your duty station. It is logical to assume that you had intended, as early as December 5, to take annual leave on December 12 and return to your residence in Buffalo. No documentation was submitted or statement made by you or your representative that you had changes those reservations. I also note that it was unusual that the events described in your March 24 replies, i.e., that you were in discomfort on December 10, 11 and 12, did not come to mind

when you spoke with Mr. Clark on January 27 and that your discomfort on December 12 coincided with your airline reservations made on December 5. I further note it is not reasonable that Mr. Clark would have considered proposing an adverse action listing two separate charges concerning your charge to sick leave/annual leave on December 12 had he been informed of so simple and routine an explanation as is provided in the March 24 written and oral replies. In summary, there was a major issue of credibility raised by your representative in your oral and written replies of March 24; I belive that Mr. Clark and the Agency took reasonable steps to resolve these questions and clarify the record so that the facts in this matter concerning your actions could be evidenced.

Sworn statements were taken from employees in your office who had knowledge of the situation relative to your actions of December 15 and from Mr. Clark who made a sworn statement concerning his meeting of January 27, 1981. I submit to you that new facts or circumstances were not introduced in the amended letter of proposed adverse action of May 29, 1981. The charges amended all flow back to the basic questions at hand, specifically, what did you do with regard to documentation of your amended timecard? I find the amended charges more clearly, and without prejudice, inform you of exactly what the Agency was charging you with.

[-7-]

It is also important to note that all the evidence the Agency felt necessary to obtain was provided to you, along with amended, clearer charges but not new charges. Further, should a procedural error have been made, which I do not believe happened, it is evident that your procedural rights in this administrative matter were not abridged and no harmful error occurred. You were given an additional opportunity to make an oral and written reply to the information presented to you, you were given another thirty day notice period. I do not agree with your representative's assess-

ment that you were denied due process in this matter, nor do I believe that you were entrapped by Mr. Clark.

Which brings me to an additional area I feel it important to address before continuing on with my further findings in this matter. Your representative made serious and repeated charges that you were denied due process because of the designation of Mr. Roger Clark, the OSHA New York Regional Administrator, your supervisor and the official who proposed this adverse action, as the official to whom you would present an oral reply, if you chose to make one. The Office of Personnel Management regulations and those of the Department relating to Part 752 have been followed by the Agency in this matter. Office of Personnel Management regulations state in Part 752, Subchapter 3-3(g):

(5) The law is silent on whom the agency may designate to hear an employee's oral answer. The Office's regulations require that the person designated be one who has delegated authority in the agency to make or recommend a decision. Several court decisions have defined more clearly the type of employee or official who can properly be designated:

(a) In *Ricucci* v. *United States*, the court held that the oral reply officer". . .must play a role other than as presiding over a recording and transcribing medium." Such officers, the court stated, should be ones who are familiar with the area involved and would normally make recommendations in that area. In *Ricucci*, the court specifically indicated that trained investigators of any kind should not serve as oral reply officers because they negate the feedback an employee must recieve to have a proper oral answer.

(b) The right to answer orally is not met by an appearance before an investigator charged with the duty of developing the facts to support the reasons for action, when the investigator is not the employee's supervisor or even superior in the chain of command. *(Patterson* v. *United States)*

(c) The law does not guarantee an interview with any particular official as long as the employee is given the opportunity to answer a superior with authority to recommend or take final

action. *(O'Brien* v. *United States)* OPM's interpretation of the term "superior" is that an official duly authorized to judge an employee's case and either decide or recommend a decision is in that respect a superior to the employee.

[-8-]

Your representative is not correct in asserting that your are entitled to a "full hearing". Office of Personnel Management regulations and those of the Department provide:
Office of Personnel Management regulations, FPM 752, Subchapter 3-3(g):
". . . The right to answer orally in person does not include the right to a formal hearing with examination of witnesses unless the agency provided one in its regulations in accordance with subsection (g) of this section."
(Section 752.404(c))
DOL regulations (DLS Appendix B to FPM 752D, Section 5) state:
A. The right to answer orally in person does not include the right to a formal hearing with examination of the witnesses.

Further, this Agency has gone a step further in assuring that your oral reply be fully and accurately recorded for the record I reviewed. A court reporter was retained on March 24 to record every word of your oral reply; the regulations require only that a "summary" of the oral reply be made. Had you made an oral reply to the amended charges, a court reporter would have again been retained. In my review of the record, I noted that your representative took issue with the fact that during the oral presentation of March 24, Mr. Clark seemed "visibly upset or angry" when he learned that you had re-submitted amended timecards to Payroll and that you had changed the information as submitted on your original amended timecard. On January 27, 1981, Mr. Clark specifically told you resubmitting a second (amended) timecard was unnecessary and at the very least it would be done once the adverse action ws commenced. Then, at the direction of your pri-

vately retained counsel, you resubmitted a second amended timecard with different annotations. Your action, in which you disregarded the specific and clear direction from your immediate supervisor and instead acted upon the advice of your representative in a matter involving the internal affairs of this Agency is inappropriate and borders on insubordination. Your action, in this matter and others in the record, could reasonably have had a detrimental effect on you supervisor's confidence in your ability to perform and carry out your responsibilities as directed. While I will not consider your action as a basis or reason in my findings in this matter, I think it shows that Mr. Clark played a role other than as simply presiding over a recording and transcribing medium.

I now will proceed with communicating my findings with respect to the remaining charges. As was urged by your representative in his July 2, 1981, submission, "Obviously all of the information and response previously submitted to the original notice of proposed adverse action should be considered. We also urge consideration of the oral presentation made on March 24, 1981, and the various pieces of correspondence raising the procedural irregularities throughout this matter." The whole proper record has been reviewed in relation to all charges.

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Reason 2: You directed a subordinate employee to prepare an amended timecard with information that was false.

Specification 1 for Reason 2: On December 15, 1980, the Albany Area Office timekeeper, Ms. Darlene Burdick, asked you if you took any leave during the week of December 8 through 12, 1980, in order that she could complete an amended time card for you for the pay period ending December 13, 1980. You told Ms. Burdick to show eight (8) hours of sick leave for Friday, December 12, 1980, on your amended time card. You did not tell Ms. Burdick to show any amount or type of leave for Thurs-

day, December 11, 1980. You initialled and signed this amended time card on December 15, 1980. You directed a subordinate employee to prepare an amended time card with information which was false; you were not in a duty status on Thursday, December 11, 1980, and did not take positive action to charge appropriate leave for that day.

Findings: Based on the information already communicated to you in my findings for Reason 1, I find this specification sustained by a preponderance of the information evidenced in the record. Therefore, I find reason 2 sustained.

Reason 3: You made false statements in Government matters.

Specification 1: In a meeting in your office on January 27, 1981, you advised me that you had been sightseeing with your sister in New York City on December 11 and 12, 1980, and that your leave status for those two days should have been annual leave (for both days). I showed you the amended time card that had no type or amount of leave charged for December 11, 1980 and eight (8) hours of sick leave charged for December 12, 1980. You said the card was wrong. You said that you did not know how the time card got that way, but that it was wrong. You made a false statement to me in telling me that you did not know how the time card got that way [i.e., no charges to leave on December 11 and a charge to sick leave for December 12] because you had provided your timekeeper, Ms. Burdick, on December 15, 1980, the informaion as reflected on the amended time card.

Findings: Based on the information already communicated in my findings for Reason 1, I find this specification sustained by a preponderance of the information evidenced in the record. Therefore, I find reason 3 sustained.

I believe it is necessary that I make clear to you that I am the official charged with the authority and responsibility to make the decision in this matter. I consider that responsibility a very important and serious one. My decision affects your tenure with the

Agency, your livelihood, in fact, your future. My authority and responsibility to issue this decision gets to some of the most basic responsibilities of my position, one of which is to assure that the decision in this matter promotes the efficiency of the service, a responsibility I am charged with carrying out in all my day-to-day affairs. In a matter of this

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degree of seriousness, I made the decision on the full record, not simply a recommendation from one of my subordinates. I assure you, and I believe the length and substance of this letter of decision bears me out, that I gave full, specific and careful consideration to everything you chose to submit for my consideration and the record as a whole.

Your oral and written replies to the proposed adverse action indicate that you do not agree that the proposed adverse action validly made reference to a previous suspension for misuse of GSA vehicles that would be considered in the disposition of this matter. I find the premise proferred by your representative that there is little or no nexus or basis for reference to a misuse of GSA vehicles and an adverse action proposed for alleged making of false statements in official matters and having subordinates act on such information when the party is a senior official of this Agency, an Area Director responsible for representing the Agency to the public, not valid. The issues involve credibility, administrative prudence and demeanor, responsible fiduciary action, adherence to managerial mandates and appropriate supervisory behavior and example-setting. As a supervisor of law enforcement officials, you are often called upon to appear before judicial and quasi-judicial bodies. As a senior level representative of this Agency, you appear before a wide range of professional, business and labor organizations representing this Agency and the safety and health profession. In each forum credibility is essential to effective performance of fostering safety and health. Unprofessional conduct, whether misuse of GSA vehicles or conduct as referenced in the

proposed adverse action and in the record impacts your peers, subordinates, superiors and the public in that such conduct precipitates doubt about fully relying upon you or your advice. Adverse reflections upon your personal character potentially impair the functioning of a sensitive law enforcement agency and appropriate supervisory relationships with your employees. Your employees can hardly be expected to properly follow Agency policy and procedures when you violate or ignore them with impugnity. Questionable conduct in any arena, including the performance of administrative duties of your position, impugns the essence of your professionalism as a law enforcement official of this sensitive and controversial Agency. Questionable behavior such as misuse of GSA vehicles, or making false statements in official administrative matters, cannot be condoned in that I find it impairs the efficiency of the Agency.

In reaching my decision in regard to the degree of discipline to be imposed as a result of my findings outlined above, I considered a number of factors to determine the most appropriate sanction that would best promote the efficiency of the service. One of the issues I took into consideration was adverse action taken against you in 1979 for misuse of GSA vehicles. In that instance as well as in the current action your administrative and fiduciary performance and lack of credibility has been at issue. Your representative proferred as an example of your honesty and integrity the fact that you charged annual leave rather than taking administrative leave for a trip from Buffalo (your residence) to Albany

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(your official duty station). As an official approving travel and leave for employees reporting to you, you must know that such time (from home to office) is commuting time and thus you were not entitled to administrative leave. It is a matter of personal concern how far or how close to his/her official duty station an employee resides, but getting to work on time is the employee's responsibility. The instance cited by your representative does not

qualify for the general excused absence for tardiness as a result of hazardous weather conditions or other disruption of public or private transportation. As an official and supervisor of long standing in the Department of Labor, it is not credible that you could misinterpret such basic leave regulations which are the subject of an annual DOL Spotlight for Supervisors. The proferring of such misinformation is a reflection on your credibility.

Standing alone, sustaining the specific instances of misconduct you were charged with in this adverse action may not have justified so severe an action as your removal from your position and the Federal service. However, when coupled with the past adverse action taken against you, which involved issues of great importance revolving about your administrative and fiduciary responsibilities and credibility, as does this action, I am not confident that an alternate less severe action would deter such conduct or promote the future efficiency or effectiveness of the Agency or the service. The preponderence of the evidence shown in the record indicates that you did act as alleged in the proposed adverse action. My very careful and specific review of the record indicates that there is a reasonable basis to question your professional demeanor and character, your willingness to follow Agency policies and procedures and your credibility, as discussed throughout my summaries of findings. This action and my decision are consistent with action taken with regard to other individuals who have committed similar or repeated acts of misconduct.

I believe that the efficiency of the service will be promoted by my decision, which is to remove you from your position of Safety and Health Manager, GS-0018-14, in the OSHA Albany Area Office and the Federal service.

You have the right to appeal this decision to the Merit Systems Protection Board (MSPB) any time during the period beginning with the day after the effective date of your removal until not later than twenty (20) calendar days of that effective date. If you appeal this decision, your written submission must be sent to the

New York Field Office, Merit Systems Protection Board, New York Region, 26 Federal Plaza, Room 2339-A, New York, New York, 10007. Your submission must be made in accordance with the procedures outlined in the enclosed copy of MSPB organization and procedures and should include a completed copy of the enclosed MSPB appeal form. The appeal should include your reasons for contesting your removal with such offer of proof and pertinent documents as you are able to submit.

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You may obtain additional information about these appeal rights by contacting Ms. MaryAnn Piretti of the OSHA Personnel Office, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room N-3427, Washington, D.C. 20210. She may also be contacted by telephone at (202) or FTS 523-8006. For information regarding health insurance coverage, retirement benefits, and clearance procedures, contact Mr. Bruce Rosenbaum, U.S. Department of Labor, OASAM Personnel Office, 1515 Broadway, Room 3230, New York, New York, 10036. He may be contacted by phone on FTS 662-3083 or commerical (212) 944-3083.

The effective date of your removal from the Federal service and your position of Safety and Health Manager, GS-0018-14, in the Albany Area Office of OSHA-DOL, is August 3, 1981. Until that time, you will remain in a full pay and duty status. A Standard Form 50 effecting your removal is attached. Copies of the notice of proposed adverse action and all materials relied upon in proposing the action, the transcript of your oral reply and copies of your written replies, this notice of decision, the SF-50 effecting your removal from your position and the service and any supporting material will be maintained by the Department of Labor.

Sincerely,
[Signature]
John B. Miles, Jr.
Field Coordinator

Enclosures (3)
Copy of MSPB Organization and Procedure
(Federal Register of June 29, 1979
Copy of MSPB Appeal Form
Employee copy of SF-50

cc: Mr. Carmin Putrino
Lipsitz, Green, Fahringer, Roll, Schuller and James — Attorneys at Law
One Niagara Square
Buffalo, New York 14202

MY SIGNATURE CERTIFIES THAT I WAS GIVEN THIS LETTER OF TWELVE PAGES AND THREE ENCLOSURES AT THIS TIME, ON THIS DATE.

[Signature Charles Schwender]
[Date 8/3/81]
[Time 2:15 P]

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK REGIONAL OFFICE

P. Charles Schwender

v.

Department of Labor

Initial Decision Number NY07528110391
Date December 21, 1981

INTRODUCTION

By petition received August 24, 1981, Mr. P. Charles Schwender appealed his removal by the Department of Labor, Occupational Health and Safety Administration, effective August 3, 1981.

JURISDICTION

When removed, appellant held a position in the competitive service and was not serving a probationary or trial period. He is therefore entitled to appeal to the Merit Systems Protection Board pursuant to 5 U.S.C. 7701, 7511, 7512, 7513, and 5 C.F.R. 752.401.

ANALYSIS AND FINDINGS

Appellant was employed by the agency in the capacity of Area Director, Albany, New York. By letter dated May 29, 1981 (agency file, tab 13), appellant's superior, Regional Administrator Clark, proposed to remove appellant for falsifying his timecard for two days, instructing a subordinate to prepare the false timecard, and making false statements to him (Clark) concerning the timecard. Appellant, through his counsel, replied orally and in writing to the proposed adverse action (agency file, tabs 8 and 9). Appellant's counsel submitted statements raising questions of fact concerning the proposed action, and objected to the "apparent lack of investigation" of the case.

The deciding official, Mr. Miles, thereupon ordered Mr. Clark to conduct a further investigation (agency file, tab 12). Mr. Clark did so, and, as a result, issued two amendments to the proposed

adverse action on May 29th (agency file, tab 13). These amendments named a different employee as being the person appellant allegedly instructed to prepare the false timecard, and expanded the charge of making false statements in official matters to encompass both dates on which timecards were purportedly falsified, rather than just one date. As amended, the charges against appellant read:

REASON 1: You falsified an amended timecard covering your duty status on December 11 and December 12, 1980.

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Specification 1: You initialed and signed an amended timecard showing yourself in a work status on December 11, 1980 when you were not actually performing duties related to your position. You told me on January 27, 1981, in a meeting in the Albany Area Office, that the reflection of eight hours work status on December 11 was a mistake, and that the time on December 11, 1980 should have been charged to annual leave. This is a violation of the DOL Code of Ethics and Conduct, Appendix A(K) in that you made a false statement in a Government matter on the amended timecard.

Specification 2: You initialed and signed an amended timecard showing yourself on sick leave December 12, 1980. You indicated to members of your staff that you had a dentist appointment for that day, but later told me on January 27, 1981, in a meeting in the Albany Area Office, that that was not correct, and that the time for December 12, 1980 should have been charged to annual leave. This is also a violation of the DOL Code of Ethics and Conduct, Appendix A(K) in that you made a false statement in a Government matter on the amended timecard.

REASON 2: You directed a subordinate employee to prepare an amended timecard with information which was false.

Specification 1 for Reason 2: On December 15, 1980, the Albany Area Office timekeeper, Ms. Darlene Burdick, asked you if you took any leave during the week of December 8 through 12, 1980, in order that she could complete an amended timecard for you for the pay period ending December 13, 1980. You told Ms. Burdick to show eight (8) hours of sick leave for Friday, December 12, 1980, on your amended timecard. You did not tell Ms. Burdick to show any amount or type of leave for Thursday, December 11, 1980. You initialed and signed this amended timecard on December 15, 1980. You directed a subordinate employee to prepare an amended timecard with information which was false; you were not in a duty status on Thursday, December 11, 1980, and did not take any positive action to charge appropriate leave for that day.

REASON 3: You made a false statement on a government matter.

Specification 1: In a meeting in your office on January 27, 1981, you advised me that you had been sightseeing with your sister in New York City on December 11 and 12, 1980, and that your leave status for those two days should have been annual leave (for both days). I showed you the amended timecard that had no type or amount of leave charged for December 11, 1980 and eight (8) hours of sick leave charged for December 12, 1980. You said the card was wrong. You said that you did not know how the timecard got that way, but that it was wrong. You made a false statement to me in telling me that you did not know how the timecard got that way (i.e., no charges to leave on December 11 and a charge to sick leave for December 12) because you had provided your

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timekeeper, Ms. Burdick, on December 15, 1980, the information as reflected on the amended timecard.

> Your position as an OSHA Area Director requires that your conduct be above reproach. You are expected to uphold all of the laws and programmatic and administrative regulations pertinent to your position, and are expected to be accurate in reporting the hours worked by all subordinates. I consider it a very grave situation when an employee in a position such as yours intentionally falsifies his own timecard. Such actions do not speak well for your ability to be accurate and to comply with the regulations involved. I also consider the effects on your staff of such actions to be potentially damaging, since your subordinates must be able to rely on your equity and accuracy in handling all such matters. This is not the first instance of your displaying poor judgment in handling the administrative management of your office and position, since on July 2, 1979 an adverse action was taken against you effecting a sixty day suspension for misusing a GSA vehicle.

Appellant was afforded the opportunity to reply to the amended charges, and did so (agency file, tab 17). Thereafter, on July 31, 1981, Mr. Miles issued his decision sustaining the charges against appellant and sustaining the proposal to remove him (agency file, tab 18).

To sustain an action under 5 U.S.C. chapter 75, subchapter II, the agency must first prove, by a preponderance of the evidence, that the appellant committed the acts alleged. *Parker* v. *Defense Logistics Agency*, 1 MSPB 498. "Preponderance of the evidence" is defined in the Board's regulations as "that degree of relevant evidence which a reasonable mind considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true." 5 C.F.R. 1201.56(c)(2). The following is an analysis of the specific charges against appellant in light of this standard.

It is undisputed that on Monday, Tuesday, and Wednesday, December 8, 9, and 10, 1980, appellant attended an Area Directors' conference at the Regional Office in New York City. On Friday,

December 5th, prior to leaving for this conference, appellant told his office manager, Ms. Joos, that in addition to attending the conference, he would be "in the Region" (on business) on Thursday, and on leave on Friday, December 11th and 12th (Tr. 23). Appellant's version of this conversation was essentially identical, except he claims to have also told Ms. Joos the specific nature of his business "in the Region" (he wanted to see one of the agency's solicitors), as well as his reason for being on leave Friday (he might have a dental appointment) (Tr. 15).

Appellant's superior, Regional Administrator Clark, testified that on Thursday, December 11th, he and some colleagues happened to sell appellant at St. Patrick's Cathedral in New York City. Inasmuch as this was the day after the Area Directors' conference, Mr. Clark expected appellant to have returned to his office in Albany, and was surprised to see him in New York. Approximately two weeks later, appellant's timecard arrived at the Regional Office showing that he claimed to have been on duty status on the day Mr. Clark

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observed him in New York. When this was brought to Mr. Clark's attention, he went to Albany, on January 27th, to investigate (Tr. 169-172).

Mr. Clark stated that appellant admitted to him that he had been sightseeing in New York on both Thursday, December 11th *and* Friday, December 12th, and that he should have been on annual leave those days, although he had also been having trouble with his teeth. Appellant also allegedly told Mr. Clark that he did not know how his timecard came to be as it was (Tr. 176, 185).

Finally, Mr. Clark testified as to the procedures followed within his region by Area Directors who wanted to take sick leave or annual leave. He declared that when such persons wish to take leave amounting to less than one week, they must phone either the secretary to the Regional Administrator or the secretary to the Assistant Regional Administrator, whereupon the information con-

cerning the absence is entered into a diary (Tr. 163-164, 248-249). This explanation of New York Regional procedures was corroborated by Area Director Meister, a witness called by appellant (Tr. 409).

Appellant returned to his office on Monday, December 15th. Ms. Joos testified that inasmuch as she was unsure of his exact work status for the preceding Thursday and Friday, and since a supplemental timecard had to be completed for him, she instructed the office timekeeper, Ms. Burdick, to ask appellant about his status and whether leave should be charged. Ms. Burdick did so, and Ms. Joos testified that she overheard their conversation. Ms. Joos stated that Ms. Burdick asked appellant if he was to be charged with use of leave, and appellant answered that no leave was to be charged for Thursday, and eight hours of sick leave were to be charged for Friday (Tr. 24-28).

Ms. Joos stated that subsequently, in February or March of 1981, after charges had been brought against appellant, he admitted to her that he should have charged himself with annual leave for Thursday, December 11 (Tr. 29-31, 80).

The timekeeper, Ms. Burdick, then testified. She first explained that the timecard completed on December 15th was an *amended* timecard, because the initial timecard for the pay period encompassing the week of December 8-12 was submitted on Tuesday, December 9th, at which time it was uncertain what appellant's status would be for the latter portion of the week so he was shown as working on Thursday and Friday (Tr. 92-93, 123).

Ms. Burdick then recounted her version of the December 15th conversation with appellant. She told appellant she had to send in an amended timecard for him, and then asked "you did take Friday off; sick leave, is that correct?" To this appellant replied, "yes". She then asked "is there any other time you took off during that week?" Appellant said "no". (Tr. 94-95, 128).

Mr. Burdick identified a photocopy of a timecard (agency exhibit 1) as being the card she prepared in accordance with appellant's

instructions, and which he signed. For the two days here at issue, the card shows no leave for Thursday, December 11th, and eight hours of sick leave for Friday, December 12th. About one half hour after speaking to appellant, Ms. Burdick left appellant's completed timecard in his office, along with several other amended timecards she had prepared, for his signature (Tr. 125). Agency exhibit 1 reveals that

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appellant signed his timecard and also initialed the "Friday" column where he claimed sick leave.

Appellant's version of the events of the week of December 8-12 was as follows. First, he testified that he *did* telephone the Assistant Regional Administrator's secretary, a lady called "Vinnie", and notified her of his intended absence from the office that week, including his plans for Thursday and Friday (Tr. 452, 463, 522). After the Area Directors' conference ended on December 10th, according to appellant, he stayed in New York because he wished to see one of the agency's solicitors. On the morning of Thursday, December 11th, he phoned the solicitor, but found he was not in his office. After learning he could not see the solicitor, appellant spent Thursday sightseeing in New York. During the afternoon, appellant again telephoned the solicitor and this time was able to confer with him over the telephone (Tr. 469, 495-496).

Appellant testified that he had intended to see the solicitor in person the next day — Friday, December 12th — but his teeth were bothering him so badly that he decided to neither visit the solicitor nor go to his dentist in Albany, but rather to return to his home in Buffalo (Tr. 471). Appellant explained the fact that he had purchased a New York to Buffalo air ticket for that Friday considerably before his teeth began giving him trouble, by saying that he had been unsure whether he would be returning to Albany or Buffalo, and took the Buffalo tickets because flights to that city were more likely to be booked up, whereas if he decided to go to Albany, it would be easy to switch tickets (Tr. 467-469). Appellant's

story was supported by the testimony of Ms. Foss, the airline ticket agent who sold appellant his tickets, who stated that she had advised him to arrange his travel in this manner.

Lastly, appellant explained that when he returned to his office on Monday, December 15th, things were very busy and he was confronted with a considerable backlog of work (Tr. 480). His version of the conversation with Ms. Burdick was that she asked him "is there any absence for last week, Thursday and Friday?" Appellant replied "yes, but charge eight hours sick leave to Friday", by which he intended to say he was to be charged with leave for both days, but sick leave only for Friday (Tr. 484, 521). Much later that day, Ms. Burdick left the timecards on his desk. Appellant signed them without inspecting them (Tr. 484-486).

In rebuttal of one of appellant's contentions, the agency called the Assistant Regional Administrator's secretary, Ms. Galdi ("Vinnie"). She testified that she and "Rosemary" — the Regional Administrator's secretary — kept attendance records for the Area Directors. She indicated that such Directors called in if they were going to be on sick leave or annual leave, even if only for one day, and she and Rosemary would enter the information into the diaries. Ms. Galdi produced both diaries for the period here at issue (agency exhibits 4 and 5), and neither of them showed appellant calling in for sick leave or annual leave on either Thursday or Friday (Tr. 360-370).

The Board has held that implicit in a charge of falsification of time records is proof that such falsifications were intentional. *Allen* v. *U.S. Postal Service*, 2 MSPB 582. Intent in such cases is generally proven by circumstantial evidence. *Melillo* v. *U.S. Postal Service*, MSPB No. DA075209240 (1981). I find all the charges against appellant to have been

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proven by a preponderance of the evidence and to have been shown to be intentional in nature. First, as to his having given a

subordinate false information for preparing a timecard, Ms. Joos and Ms. Burdick were consistent in all essential aspects of their testimony and entirely credible in demeanor. Their hearing testimony was also not inconsistent with their prior statements. The evidence fails to support the suggestion of appellant's counsel that Ms. Joos would not have been able to overhear the conversation between Ms. Burdick and the appellant (*see* Tr. 28, 69). Thus I conclude that appellant did instruct that no leave was to be charged to him for Thursday and sick leave was to be charged for Friday.

The preceding charge must be considered in conjunction with the charge of initialing and signing a false timecard. Appellant's actions in this regard — not only signing the card, but also initialing each line where leave was reported — bespeak deliberation and are inconsistent with the argument that he did not inspect the card, but are entirely consistent with his conversation with Ms. Burdick earlier that same day. The evidence of Ms. Galdi and her records also established that appellant did not phone in his absences to the Assistant Regional Administrator's secretary as he claimed. Although he is not being charged with the offense of failing to follow proper procedures for taking leave, the fact that he did actually fail to adhere to such procedures, and subsequently lied by saying that he did, casts doubt upon his overall credibility and is indicative of a scheme to intentionally conceal his absence. Lastly, appellant's admissions to the effect that he should have taken annual leave, made to Mr. Clark in January and to Ms. Joos in February or March, both of which I find to have been established by credible testimony, are indicative of his own awareness of wrongdoing.

Counsel for appellant placed considerable emphasis on the facts that appellant allegedly never received a formal leave statement showing his use or non-use of leave on December 11th and 12th, and that the timekeepers on occasion made mistakes in their own entries. As to the first contention, this is predicated on the assumption that appellant made an innocent omission on his time-

card, and, had it been called to his attention by a leave statement, he would have corrected it. This line of reasoning, however, is not applicable here, since I have found appellant's omissions were not merely a matter of innocent oversight. With regard to the second contention, it too is irrelevant. Regardless of how many other mistakes timekeepers may be responsible for, the evidence here indicates that the timekeeper did exactly what appellant told her to do and he knowingly signed the timecard which she prepared according to his wishes.

As to the issue of the substantive "falsity" of the information on the timecard, there was no dispute that Thursday should not have been shown as a work day, since appellant was engaged in sightseeing. It was not contended that the two telephone calls he made sufficed to put him on duty status. With regard to appellant's claim of sick leave on Friday, I find this also to have been substantially false, regardless of whether his claim rests upon a dental appointment or just tooth pain. First, based on my assessment of demeanor, I find more credible Mr. Clark's testimony that appellant admitted to him he was sightseeing and should have been on annual leave *both* Thursday and Friday, than I do appellant's testimony to the contrary. Second, appellant's proven untruthfulness in other matters, noted above, also casts doubt on the

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reliability of his statements in this regard. (*See Blocker* v. *Department of the Army*, MSPB No. DC07528010255 (1981)). Additionally, appellant's proven failure to call in sick, as he claimed he did, like his failure to phone in for annual leave, raises questions about his overall veracity and also suggests he was not genuinely ill on Friday. Thus, the charge of initialing and signing a false timecard has been proven by a preponderance of the evidence.

The above findings inevitably lead to the conclusion that the third and last allegation against appellant — that he falsely told his superior he didn't know how his timecard came to be as it was — must also be regarded as proven. Appellant did know why his

timecard reflected the leave shown on it since he instructed Ms. Burdick to so prepare it and he subsequently signed it. Telling Mr. Clark otherwise was an intentional misstatement in a matter of official business. Therefore this allegation too has been proven.

5 U.S.C. 7513(a) specifies that an employee may be removed, pursuant to subchapter II, chapter 75, Title 5, of the United States Code, "...only for such cause as will promote the efficiency of the service". A determination of this issue turns on "whether there was any connection between the employee's activities and the efficiency of the service". *Young* v. *Hampton*, 5[illegible] F.2d 1253, 1258 (7th Cir. 1977).

In the case at hand, there is an evident nexus between an employee's misrepresentation and falsification of documents and the efficiency of the service. The Board has recognized that an agency has an unchallengeable right to expect its employees to be truthful in all matters of official business. *Giesler* v. *Department of Transportation*, MSPB No. DE75299018 (September 29, 1980). Similarly, the courts have held that there is a nexus between a federal employee's falsification of time records and the efficiency of the service, and that it is within the employing agency's discretion to impose the penalty of removal for such offense. *Birnholz* v. *U.S.*, 199 Ct. Cl. 532 (1971); *Phillips* v. *Bergland*, 586 F.2d 1008, 1011 (4th Cir. 1978).

Appellant's counsel raised a considerable number of general defenses and objections, based upon alleged procedural errors and violations of due process, which must be dealt with at this point. First, he contended that it was improper for the agency to amend the charges brought against appellant after appellant had already replied to the first charges. I reject this contention.

Initially, it must be emphasized that appellant had the opportunity to reply to the new or amended charges, that he availed himself of such right, and that his response was considered by the deciding official, Mr. Miles. Second, the reason amended charges were brought was that appellant made certain factual representa-

tions which were at variance with the information adduced by the agency's initial investigation. This motivated Mr. Miles to order Mr. Clark to investigate further (*see* Tr. 253, also decision letter, tab 18, page 150, agency file).

As a result of the subsequent investigation, the agency amended its specifications to make the factual bases of its charges more accurate. I find

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nothing objectionable in any agency revising charges to make them more accurately reflect the true facts of its case as long as appellant retains the right to reply thereto. In fact, doing so bespeaks a commendable interest in discovering the truth. My conclusion in this regard also seems in accord with Board precedent which permits an agency to bring a subsequent adverse action based upon the same reasons as a previous action which was cancelled and never decided on its merits. *Cabral* v. *Department of Health & Human Services*, MSPB No. PH07528010331 (1981).

Appellant also argued that it was erroneous for the agency to compel him to make his oral reply to Mr. Clark — the same person who proposed the adverse action. I also find no merit to this contention. First, neither the statute (5 U.S.C. 7513) nor the regulations (5 C.F.R. 752.404) dealing with an employee's right to reply to a proposed adverse action limit the agency's right to designate whomever it sees fit to hear such oral reply. The Board has held that it would be harmful error for a deciding official not to consider an oral reply, but here it is not disputed that both appellant's oral reply and his written reply were faithfully transmitted to, and considered by, Mr. Miles.

It was also contended that Mr. Clark did nothing more than "preside over a recording and transcribing medium," not affording "the feedback to which appellant was entitled" (appellant's post-hearing brief, p. 14). In ths regard, I know of no authority holding precisely what level of "feedback" an oral reply officer is obliged to provide. In any event, the agency file (tab 8) contains a

verbatim transcript of appellant's oral reply which was transmitted to Mr. Miles. This transcript indicates that appellant's counsel made a lengthy speech, unbroken expect by two questions posed by Mr. Clark. It does not reveal that appellant or his counsel attempted to initiate any conversation or discussion, or that Mr. Clark frustrated any "give and take" the appellant wished to engage in. Still less does the transcript show that Mr. Clark was hostile or uninterested. I find no basis for concluding that the naming of Mr. Clark as oral reply officer, or his subsequent behavior in that role, was in any way violative of appellant's rights.

It was also maintained that in appointing the official who proposed the adverse action to hear the oral reply, the agency denied appellant the right to a "meaningful recommendation" or "a chance of success in establishing matters in defense or mitigation". However, this too is not supported by the facts herein. First, it was not established by any direct evidence that Mr. Clark was prejudiced against the appellant, and I do not believe that bias or animus can be inferred from the mere fact that Mr. Clark proposed adverse action. Thus, there is no reason to suppose that had appellant raised a convincing defense, it could not have affected Mr. Clark's recommendation. Furthermore, as to appellant's "chance of success," it is clear from the hearing testimony of Mr. Miles, and the decision letter itself, that Mr. Miles was aware of, and gave the most careful first-hand consideration to all of appellant's arguments and defenses. Thus, appellant did indeed have a "chance of success" — he had his position conscientiously considered by an unbiased deciding official. It was not shown that Mr. Clark inhibited such defense or that there is any appreciable likelihood that the presence of some other oral reply official would have resulted in the agency's reaching a different decision. It should also be noted that in *Svejda* v. *Department of the*

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Interior, MSPB No. DC07528010078 (1981), the Board held that there is no general proscription of the appointment as a deciding

official of a person who is familiar with the facts of the case and has expressed a predisposition contrary to the appellant's interests. With the Board permitting this in the case of the far more crucial role of deciding official, it seems apparent that there can be no *per se* harm in having a proposing official serve in the lesser role of oral reply official. There was also the suggestion that it was improper for Messrs. Miles and Clark to have *ex parte* discussions of appellant's case, but the Board has explicitly rejected the notion that communications between proposing and deciding officials violate an appellant's procedural rights. *Malone* v. *Department of Health and Human Services*, MSPB No. NY07528010089 (1981).

Appellant's final argument was that the deciding official relied on matters not specified in the notice of proposed adverse action in reaching his decision. It was alleged that three such additional matters influenced the decision: (i) appellant's "insubordinate" filling out of a third timecard, showing annual leave for December 11th, after charges had already been brought against him, and contrary to Mr. Clark's instructions not to attempt to "correct" his records until the charges had been adjudicated; (ii) appellant's prior disciplinary history was alleged to have been used to *decide* the instant charges, rather than just to assess the proper penalty; and (iii) Mr. Miles stated that appellant's "misinterpreting" of agency regulations "is a reflection on your credibility". Dealing with the last of these items first, it is readily apparent that Mr. Miles was explaining one of the bases upon which he made his credibility determinations. This is not the equivalent of introducing a new substantive charge, and could hardly have been specified in the original proposal since it was a matter raised for the first time by appellant in his defense. As to appellant's disregard of Mr. Clark's instructions about attempting to change his timecard, page 8 of Mr. Miles' decision letter (agency file, tab 18) states, "I will not consider [this] action as a basis or reason in my findings in this matter..." and appellant has not established otherwise. Regarding the alleged misuse of appellant's past record,

Mr. Miles' allusions to this matter appear on pages 10 and 11 of his decision letter, and clearly show that he used appellant's history not "to cast aspersions on appellant's character, demeanor, and credibility" as was alleged, but rather to conclude that the charges he sustained in the instant case were not dissimilar to appellant's past offense and demonstrated unprofessional and dishonest conduct inappropriate for a manager, and that the two offenses considered together made removal appropriate.

It is well established that the burden is on appellant to prove that the agency committed error in taking an action and that such procedural error is "harmful". The Board has defined "harmful error" to mean:

> Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

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5 C.F.R. Section 1201.56(c)(3); *See also Parker* v. *Defense Logistics Agency*, 1 MSPB 489 (1980). In the case at hand, appellant has not established such an affirmative defense.

A third, distinct, determination must now be made as to whether the particular punishment imposed in this case is appropriate to the offense proven. The Merit Systems Protection Board has the authority to mitigate a penalty when it determines that the agency-imposed penalty is clearly excessive, disproportionate to the sustained charges, arbitrary, capricious, or unreasonable. *Douglas* v. *Veterans Administration*, MSPB No. AT075299006 (April 4, 1981).

The most important criterion in a *Douglas* analysis is the nature and seriousness of the offense, in light of the employee's position and responsibilities, including whether the offense was inten-

tional, technical, or inadvertent, and whether it was committed for gain. Applying these standards to the case at hand, and noting the relevant legal precedent set forth in the paragraph concerning "nexus" *supra*, I conclude that appellant's offenses were of a serious nature. His behavior was intentional and knowing, was for personal gain, and did not involve the contravention of merely technical or insubstantial rules.

Also extremely relevant is the fact that appellant held an important position of trust, as director of an area office, with supervisory authority over other employees. It is well established that it may be demanded of a federal employee holding an important managerial position that he or she exhibit a higher standard of conduct than other employees and set an example for others by scrupulously adhering to rules and regulations. *Brewer* v. *U.S. Postal Service*, No. 9-79 (Ct. Cl. 1981).

Other *Douglas* criteria adverse to appellant are his past record and the effect of his offense upon his superiors' confidence in his ability to perform assigned duties. Appellant's past record includes a recent (1979) 60-day suspension for willful misuse of government vehicles. This action was appealed and ultimately sustained by the Merit Systems Protection Board. Consequently, it cannot now be collaterally attacked and the agency may rely on it as an aggravating factor. *Howard* v. *Department of the Army*, MSPB No. PH075209128 (1981); *Henckle* v. *Campbell*, 462 F. Supp. 1286 (D. Kan. 1978). As to supervisory confidence in appellant, the testimony of Messrs. Miles and Clark makes it evident that management can no longer trust appellant's honesty or rely upon him as the chief representative of the agency in Albany — a position which involves handling important and sensitive matters and dealing with business, labor, and the general public (Tr. 184, 254).

Another *Douglas* factor which must be considered is the consistency of the penalty with those imposed on other employees for the same or similar offenses. Although appellant's counsel alleged

disparate treatment, he was only able to adduce evidence of one case which, arguably, might show inconsistent treatment. Area Director Meister testified that he knew of another employee of comparable managerial rank who abused government travel orders, but was transferred rather than removed (Tr. 417). However, Mr. Meister acknowledged that he was not aware of all the details or of any mitigating or aggravating factors which might have existed in that case. Other cases cited by appellant involved instances in which adverse action was

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proposed, but no action was taken, or cases with dissimilar offenses (*see* appellant's exhibits 3, 4, 13). On the other side of the coin, Mr. Miles cited a prior case he was involved in, in which an Area Director was removed for, among other things, falsifying timecards (Tr. 257). This evidence fails to prove disparate treatment.

Mitigating factors favoring appellant are that his work, according to his performance evaluation, was better than satisfactory (appellant's exhibit 12); that his offense was not notorious in nature; and that his reputation in the community is good (Tr. 473-475).

The *Douglas* case, itself, as well as relevant court decisions, teach us that great discretion must be accorded to agencies in determining the appropriate penalty for a particular offense. *See e.g. Rotolo* v. *Merit Systems Protection Board and Internal Revenue Service*, No. 80-1183 (1st Cir. 1980). The function of the Merit Systems Protection Board is to ensure that relevant factors do not go unconsidered in assessing discipline and that the discipline imposed is within the *range of reasonableness*. Even if the Board should determine that the agency selected punishment is unreasonable, the Board is not then free to simply impose the discipline it thinks best. Rather it must apply the maximun penalty that falls within the parameters of reasonableness. *Davis* v. *Department of the Treasury*, MSPB No. NY075209075 (1981).

In light of the above principles, taking into account the misconduct proven herein and appellant's past disciplinary record, I cannot conclude that removal is excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable.

DECISION

The agency's action is sustained.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on Jan. 25, 1982 unless a petition for review is filed with the Board thirty-five (35) calendar days after the issuance of this decision or the Board reopens the case on its own motion.

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review of this decision with the Merit Systems Protection Board. The petition must identify specifically the exception takn to this decision, cite the basis for the exception, and refer to applicable law, rule, or regulations.

The petition for review must be filed with the Secretary to the Merit Systems Protection Board, 1120 Vermont Avenue. N.W.. Washington, D.C. 20419, no later than thirty-five (35) calendar days after issuance of this decision.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to establish that:

(a) New and material evidence is available that despite due diligence was not available when the record was closed; or

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(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Under 5 U.S.C. 7703(b)(1) the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any *final* decision of the Board provided the petition is filed no more than thirty (30) calendar days after finality.

For the Board:

[Signature]
Joseph K. Riotto
Presiding Official

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

P. CHARLES SCHWENDER
v.
DEPARTMENT OF LABOR

DOCKET NUMBER
NY07528110391

OPINION AND ORDER

P. Charles Schwender, (appellant), an Area Office Director, was removed by the Department of Labor (agency) for making false statements to his supervisor regarding his time card, instructing a subordinate to prepare a false time card and for falsifying his time card.

On appeal to the Board's New York Regional Office, the presiding official, after a hearing, found that the agency had supported the charges by a preponderance of the evidence and that the removal penalty was reasonable.

Appellant filed a timely petition for review challenging the initial decision on several grounds. First, the appellant contends that the presiding official erroneously utilized the "preponderance of evidence" standard rather than the higher "clear and convincing" standard required in cases of fraud. The appellant cites as precedent for this contention two cases, both of which predated the effective date of the Civil Service Reform Act which explicitly provides, at 5 U.S.C. §7701 (d) (1) (B), that the preponderance of evidence standard shall be applied in all conduct related cases. *Edgeston* v. *U.S. Postal Service*, 1 MSPB 289 (1980).

The appellant next contends that the most egregious procedural error was committed when appellant was denied his right to an oral reply. In support of his contention, appellant asserts the

agency failed to appoint an impartial oral reply official and the oral reply official appointed denied appellant objective feedback during the oral response and thereafter engaged in improper *ex parte* communications with the deciding official. This contention was previously raised before the presiding official who correctly concluded that no procedural error was committed. The presiding official found that there was no authority supporting the proposition that a deciding official, much less a proposing official, must be completely impartial or that an official hearing an oral reply must take an active role in the process. *Svejda* v. *Department of the Interior*, 7 MSPB 36 (1981).[1] Moreover, the presiding official relied upon specific Board precedent in concluding that private communications between proposing and deciding officials do not violate an appellant's procedural rights. *Malone* v. *Department of Health and Human Services*, 6 MSPB 184 (1981). Thus the agency complied with all relevant statutory and regulatory requirements when it designated an oral reply officer with authority to recommend a final decision and when the oral reply was transmitted to the deciding official who considered it in his final decision. 5 U.S.C. § (b)(2); 5 C.F.R. § 752.404 (c)(2).

Appellant also alleges that the presiding official's findings are not supported by the record. However, the

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[1] The instant case can be distinguished from *Sullivan* v. *Department of the Navy*, No. 83-748 (Fed. Cir. 1983), in that the proposing official's eyewitnessing of some of the incidents underlying the charges and his subsequent initiation of the removal action did not render him a "non-disinterested adversary" as alleged by appellant.

specific objections raised by appellant merely take issue with the presiding official's weighing of evidence and credibility assessments of witnesses and do not dispute the presiding official's in-

terpretation of statutes or regulations. As the appellant has not persuasively identified anything in the record which could arguably justify different credibility assessments, due deference will be accorded to the presiding official who had an opportunity to observe and assess the demeanor of witnesses. *Weaver* v. *Department of the Navy*, 2 MSPB 297 (1980). In addition, while appellant has referenced a few instances of conflicting evidence, such conflicts are not of sufficient weight to raise a serious question about the presiding official's factual determinations. *Daniels* v. Veterans *Administration*, 5 MSPB 197 (1981).[2]

Additionally, appellant's allegation regarding agency error in considering matters outside the notice is without merit. The allegation was also unpersuasively raised before the presiding official who correctly found that the deciding official's reliance on information not in the proposed removal notice including that information raised by appellant in his defense was properly relied upon for the purpose of making credibility determinations and deciding the appropriate penalty.[3]

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[2] Appellant's contention that there is no nexus between the offenses charged and the efficiency of service" is based on the erroneous premise that the agency did not prove that appellant's action was anything more than innocent error.

[3] The deciding official considered appellant's past record, appellant's violation of his supervisor's instruction not to amend time cards after removal was proposed (raised by appellant) and appellant's interpretation of administrative leave requirements.

Finally, appellant contends that the penalty of removal is excessive. Again, appellant bases his contention on his disagreement with the presiding official's finding of fact regarding the charges sustained. The record supports the presiding official's findings

that appellant's behavior was intentional and for personal gain, which was particularly significant in light of appellant's important position of trust as an area office director with responsibilities involving sensitive matters and interaction with business, labor and the general public. Also considered by the presiding official was appellant's past disciplinary record, which included a suspension for willful misuse of government vehicles. Having found that the agency could no longer trust appellant's honesty, the presiding official correctly sustained the removal penalty as being within the range of reasonableness. *Douglas* v. *Veterans Administration*, 5 MSPB 313 (1981); *Davis* v. *Department of the Treasury*, MSPB Docket No. NY075209075 (1981).

Accordingly, the petition for review is DENIED. 5 C.F.R. § 1201.113 (b).

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision sustaining appellant's removal shall become final in five (5) days from the date of this order. 5 C.F.R. § 1201.113 (b).

The appellant is hereby notified of the right under 6 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:
Feb. 23, 1984 [SIGNATURE]
(Date) Robert E. Taylor, Secretary
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPINION AND ORDER was sent by certified mail this date to:

P. Charles Schwender
105 Chapel Wood
Amherst, New York 14226

By regular mail service to:

Carmin R. Putrino
Lipsitz, Green, Fahringer,
Roll, Schuller & James
1 Niagara Square
Buffalo, New York 14202

Sheila K. Cronan
Office of the Solicitor
U.S. Department of Labor, Room N-2464
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Office of Personnel Management
Attn: Appellate Policies Branch
1900 E Street, N.W., Room 7P56B
Washington, D.C. 20415

By hand to:

Office of the Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

(Date)
Washington, D.C.

Robert E. Taylor, Secretary

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals
for the Federal Circuit

P. CHARLES SCHWENDER,
Petitioner,
v.
DEPARTMENT OF LABOR,
Respondent.

Appeal No. 84-1403.

DECIDED: April 29, 1985

Before MARKEY, *Chief Judge*, RICH, *Circuit Judge*, and NICHOLS, *Senior Circuit Judge*.

RICH, *Circuit Judge*.

DECISION

The final decision of the Merit Systems Protection Board (board), denying P. Charles Schwender's petition for review of the presiding official's decision sustaining petitioner's removal by the Department of Labor (agency), No. NY07528110391, is *affirmed*.

OPINION

Petitioner, separated for falsification of official timecard records regarding his leave, contends that the agency's decision to appoint Roger Clark as oral reply officer constituted harmful procedural error in that it vitiated the meaning and import of the regulatory provisions of 5 CFR §752.404(c)(2), which provide for a

written and oral reply prior to termination. Petitioner argues that under this court's holding in *Sullivan* v. *Department of the Navy*, 720 F.2d 1266 (Fed. Cir. 1983), the involvement of a government employee's non-disinterested adversary in pretermination hearing procedures vitiated those procedures and violated the employee's due process rights, as reiterated by the United States Supreme Court in *Cleveland Board of Education* v. *Loudermill*, 53 USLW 4306 (1985).

The presiding official found that there was no authority supporting the proposition that a deciding official must be completely impartial. The board concluded that the agency complied with all relevant statutory and regulatory requirements by designating an oral reply officer with authority to recommend a final decision and by transmitting the oral reply to the deciding official, who considered it in his final decision.

We have not been persuaded that the board erred in holding that the agency did not abuse its discretion in removing petitioner. Substantial evidence supports the board's findings that the charges against petitioner were proved by a preponderance of the evidence. The board correctly held that petitioner's allegations of procedural error were without legal basis. Finally, petitioner has failed to demonstrate that the board erred in sustaining the penalty of removal as being within the range of reasonableness.

U.S. Department of Labor
Occupational Safety and Health Administration
1515 Broadway, Room 3445
New York, New York 10036

Reply to the Attention of: PER (PCS)

February 11, 1981

Mr. P. Charles Schwender
105 Chapel Wood
Williamsville, New York 14221

Dear Mr. Schwender:

This letter is a notice of proposed adverse action, issued in accordance with Chapter 75, (Part 752 of the Office of Personnel Management Regulations), Subchapter II of Title 5 of the U. S. Code, the Civil Service Reform Act and pertinent Office of Personnel Management regulations. It is proposed to remove you from your position as Safety and Health Manager, GS-018-14, and from Federal Service, no sooner than 30 calendar days from your receipt of this notice. This action is being proposed for such cause as will promote the efficiency of the service.

This action is based upon the following reasons and specifications:

REASON 1: You falsified an amended time card covering your duty status on December 11 and December 12, 1980.

Specification 1: You initialled and signed an amended time card showing yourself in a work status on December 11, 1980 when you were not actually performing duties related to your position. You told me on January 27, 1981, in a meeting in the Albany Area Office, that the reflection of eight hours work status on December 11 was a mistake, and that the time on December 11, 1980 should have been charged to annual leave. This is a violation of the DOL Code of Ethics and Conduct, Appendix A(K) in that you made a false statement in a Government matter on the

amended time card.

Specification 2: You initialled and signed an amended time card showing yourself on sick leave December 12, 1980. You indicated to members of your staff that you had a dentist appointment for that day, but later told me on January 27, 1981 in a meeting in the Albany Area Office, that that was not correct, and that the time for December 12, 1980 should have been charged to annual leave. This is also a violation of the DOL Code of Ethics and Conduct, Appendix A(K) in that you made a false statement in a Government matter on the amended time card.

REASON 2: You directed a subordinate employee to prepare an amended time card with information which was false.

Specification: On December 15, 1980, the Albany Area Office Supervisory Office Management Assistant, Patricia Joos, asked you what entries should be made on your time card for December 12, since she and the timekeeper were uncertain of your status and your time had been recorded as regular work status. You directed them to prepare an amended time card, showing eight hours of sick leave for December 12, 1980. When questioned by me on January 27, 1981 in your office about how the amended card came to be prepared, you stated you did not know, whereas you did in fact give instructions on December 15 to your SOMA and timekeeper to have the time card prepared that way and you advised me that you did not have a dental appointment.

REASON 3: You made a false statement on a government matter.

Specification: On January 27, 1981 I asked you why an amended time card submitted for you showed you on sick leave on Friday, December 12, 1980 when you had just orally advised me that you were on annual leave in New York City on that date. You told me that you did not know how that could have happened. During that visit Patricia Joos, SOMA, advised me that she and

the timekeeper had asked you what entries should be made on your time card for December 12, 1980 since they were unsure of your status and your timecard had been recorded as regular work status. She advised me that you directed her and the timekeeper to prepare an amended time card showing you on eight hours sick leave on that date. Your initial and signature on the time card, and the information provided by Ms. Joos, document that your statement to me was false and that in fact you did know how the sick leave was recorded on the amended time card.

Your position as an OSHA Area Director requires that your conduct be above reproach. You are expected to uphold all of the laws and programmatic and administrative regulations pertinent to your position, and are expected to be accurate in reporting the hours worked by all subordinates. I consider it a very grave situation when an employee in a position such as yours intentionally falsifies his own time card. Such actions do not speak well for your ability to

be accurate and to comply with the regulations involved. I also consider the effects on your staff of such actions to be potentially damaging, since your subordinates must be able to rely on your equity and accuracy in handling all such matters. This is not the first instance of your displaying poor judgment in handling the administrative management of your office and position, since on July 2, 1979 an adverse action was taken against you effecting a sixty day suspension for misusing a GSA vehicle.

This proposal is based on the above reasons and your prior conduct as a manager in OSHA. You and/or your representative have the right to respond to this notice personally or in writing or both. The response should be directed to:

John B. Miles
Director, Office of Field Coordination
U. S. Department of Labor, OSHA
Room N3603, 200 Constitution Avenue, N.W.
Washington, D. C. 20210

Telephone Number: (202) 523-7725

You may submit affidavits or other evidence in support of your answer. You will be kept in an active duty status in your regular position, and you and your representative (if a DOL employee) will be allowed a reasonable amount of official time to secure affidavits and to prepare and present your response to this notice. You must arrange with me, or in my absence Mr. DiArchangel, for your use of official time. If there is anything in this notice concerning the proposed adverse action which you do not understand and wish explained, please contact Personnel Management Specialist Bruce Rosenbaum on (FTS) 662-3083. You have the right to receive and review copies of the material relied upon to support this proposed action. Mr. Rosenbaum can provide you with a copy of this material. You have ten (10) calendar days from the date you receive this notice to submit your reply or replies to John Miles.

Consideration will be given to extending the ten (10) days time period if you submit a request to John Miles along with your reasons for desiring more time.

No final decision will be made in this matter until your reply, or replies, whether oral and/or in writing, have been received and considered, or if no written reply is received, or oral reply requested, until after the time period specified has passed. You will be provided a written decision at the earliest practicable date.

Sincerely,

/s/ROGER A. CLARK

Roger A. Clark
Regional Administrator

cc: John B. Miles
Stefani Santy
Geraldine Piatt

LIPSITZ, GREEN, FAHRINGER, ROLL,
SCHULLER & JAMES

ATTORNEYS AT LAW

ONE NIAGARA SQUARE
BUFFALO, NEW YORK 14202

716 849-1333

NEW YORK CITY OFFICE
540 MADISON AVENUE
NEW YORK, NEW YORK
10022
212 751-1330

March 23, 1981

John B. Miles, Director
Office of Field Coordination
U. S. Department of Labor, OSHA
Room N3603
200 Constitution Avenue, N. W.
Washington, D. C. 20210

Re: Proposed Adverse Action Against
P. Charles Schwender

Dear Mr. Miles:

Enclosed please find the written response to the proposed adverse action contained in the letter dated February 11, 1981. This is being submitted simultaneously with the oral response.

I should like to take this opportunity to reiterate certain procedural objections which have been communicated to your office orally or in writing.

Initially, I would note that respondent was not ever given as much time to prepare a response as was necessary, given the charge. Certainly, the nature of the allegation was not such as would warrant the need for such haste.

I would also note our objection to the nature of the adverse action proposed, given the reason and specific therefor. In this regard, please note the apparent lack of investigation which resulted in the extreme economic and emotional burden placed upon my client.

Finally, I wish to note our objection to the decision that the oral presentation be made to Roger Clark. As Mr Clark is proposing the adverse action, we think this is inappropriate,

John B. Miles, Director
March 23, 1981
Page Two

unfair and a denial of due process. It was my understanding the person receiving the oral response should be a person in a position to make a recommendation on the charges. Certainly, Mr. Clark cannot be expected to do this impartially.

If there are any questions resulting from the written submission or the oral submission, my client stands ready to provide you with any necessary explanation and additional information.

Very truly yours,

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES

By: Carmin R. Putrino

CRP: mrm
Enc.

IN THE MATTER OF THE ADVERSE ACTION PROPOSED BY ROGER A. CLARK FEBRUARY 11, 1981

The following is a written response to the adverse action proposed by Roger A. Clark in a letter dated February 11, 1981. This response is submitted together with an oral response which is scheduled to be presented on March 24, 1981.

This response is divided according to the numbered reasons and numbered specifications contained in the notice of proposed adverse action. Reference will also be made to supporting documentation which is attached to this response. Reference will also be made to a report of investigation prepared by Roger A. Clark and submitted to P. Charles Schwender as the supporting material relied upon as a basis for the proposed adverse action. This will be referred to as the Report.

The notice of proposed adverse action dated February 11, 1981 indicates three separate reasons containing a total of four specifications which allegedly support the proposal to remove P. Charles Schwender, hereinafter referred to as the Respondent.

REASON #1.

Reason #1 alleges Respondent falsified an amended time card covering his duty status for December 11 and 12, 1980. This reason is sub-divided into two specifications, each dealing with December 11 or December 12, 1980.

SPECIFICATION #1

At specification #1, it is alleged Respondent initialed and signed an amended time card showing himself in duty status on December 11, 1980 when he was not actually performing duties related to his position. The specification states Respondent attended a meeting with Roger Clark on January 27, 1981, prior to the proposed adverse action. During the course of the meeting, according to the specification, Respondent freely admitted the December 11th entry was an oversight. The apparent support for

this reason and specification is contained in paragraph 8(c) of the Report of investigation attached hereto as Exhibit A. In that paragraph, Clark alleges he asked Respondent when he returned from New York City. Clark then states:

> "When asked, he stated, after hesitation, that his status for December 11 and 12, 1980 should be on annual leave and that he was with his sister, sightseeing in New York City on Thursday and Friday. When shown the amended time card, he said it was wrong. He said he did not know how the time card got that way, but that it was wrong."

It would appear Clark alleges this specification is also supported by the statement contained in the Report made by Patricia Joos. At paragraph 8(b) Clark states that he spoke with SOMA, Patricia Joos, on January 27, 1981. In the conversation she stated that:

> "On December 15, 1980, he [Respondent] asked his status for December 11 and 12, and he said he had a dentist appointment on December 12, 1980 and to put him on eight hours sick leave for Friday. Nothing was said regarding Thursday."

These two statements, together with the amended the time card are the only support for this specification provided to Respondent.

In fact, Respondent was initially asked what his duty status for December 11, 1980 should be. Before he was advised of the error on the time card Respondent freely admitted he was on annual leave, sightseeing

[-2-]

in New York City. This information is reflected in Specification # 1.

After advising Clark of his status on December 11, 1980 Respondent was shown the error on his time card. At that time Respondent freely indicated that there was some mistake, without hesitation. During the course of this conversation Respondent was advised by Clark not to correct the mistake on the amended time card. Respondent was told that the error would be corrected.

Contrary to the statement contained in paragraph 8(b) of the Report, Patricia Joos did not ask Respondent about his status for December 11 and 12, and he did not indicate he had a dentist appointment on December 12, 1980. The attached statement of Patricia Joos indicates that she did not speak with Respondent on December 15, 1980 about his status on December 11 and 12, 1980. In fact, she was not given instructions as to the preparation of Respondent's time card for December 11 and 12. See Exhibit B.

As alleged in the Report, on December 5, 1980, prior to the week in question, Respondent advised Joos that he would attempt to discuss a case file with one of the OSHA solicitors at the Regional Office on December 11, 1980. Respondent also made it clear that he was not sure of his status for the remainder of the week. He indicated that he may attempt to arrange an appointment to complete some dental work that was done during the previous week.

During his conversation with Clark on January 27, 1981, Respondent indicated that he attempted to discuss a

[-3-]

case file and some photographs with one of the solicitors, Ramon Cintron. On the morning of December 11, 1980, Respondent telephoned Mr. Cintron's office to arrange an appointment to review the file and the photographs. At that time he was advised that Mr. Cintron was out of the office.

At that time Respondent was advised Mr. Cintron was out of the office and, therefore, an appointment could not be scheduled. For this reason. Respondent was not able to follow through on his plan to discuss a case file with Cintron.

On the following morning, Respondent telephoned Cintron's office and spoke with him. This time Respondent made arrangements for a duplication of photographs necessary from the case file in question. During the telephone conversation, Respondent

advised Cintron that he attempted to reach him on the previous day.

Cintron confirmed he was out of the office when Respondent called.

Although Respondent had attempted to obtain a statement from Cintron verifying the conversation, he was advised that Cintron could not provide a statement without approval of the agency. Because of this and the inadequate time allotted to prepare, Cintron's statement is not available at this time.

As Respondent had previously planned to remain in New York City on December 11, 1980, he had made arrangements for an Acting Area Director to cover the functions of the Albany office. When he could not arrange an appointment with Cintron, Respondent decided to take the day as annual leave, which was his right.

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On December 15, 1980, Respondent was presented with six amended time cards for his signature. These included the time cards of five other OSHA employees in the Albany area office, as well as his own. Respondent reviewed the amended time cards of the other employees and signed each card [where] appropriate. On his own time card Respondent initialed two changes and he signed the time card.

As will appear from Respondent's amended time card, Exhibit C, there were two changes already noted on the time card requiring his initials. Both changes related to Respondent's dental problems. One change related to a claim for one hour's sick time and the second change related to eight hours' sick time claimed for December 12, 1980. This entry and its propriety will be discussed below.

Respondent initialed two changes on the amended time card, thinking these were the two amendments that were required by the previous week's schedule. He did so quickly while in the pro-

cess of reviewing the amended time cards for other employees. Respondent had earlier advised the timekeeper that the time for December 11 should be charged to annual leave and his time for December 12 should be charged to sick leave. Based upon this advice, and his reliance upon the timekeeper, Respondent expected two amendments to initial. He initialed two amendments on the time card and candidly, was guilty of an oversight.

Attached as Exhibit D is a copy of the amended time cards presented to the Respondent, together with his own. In addition, the timekeeper's work sheets related to these cards are attached as Exhibit E.

As is indicated above, all of the time cards were presented by the timekeeper on the same day, at the same

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time. Respondent devoted his primary attention to the information on the amended time cards of the other employees. He relied upon the timekeeper as to the accuracy of his own time card. A quick glance at that time card reflected two amendments, which is what Respondent expected. As will be discussed below, the amendment for eight hours sick time for December 12, 1980 is both accurate and appropriate. The omission of eight hours annual leave for December 11, 1980 is inaccurate.

While respondent advised the timekeeper that the time card should reflect eight hours annual leave for December 11, 1980, there is no question Respondent must assume the burden of this oversight. There is, however, also no question the mistake was an honest, unintentional error. Respondent had no reason to avoid charging the December 11, 1980 duty status to annual leave. Respondent had an abundance of annual leave remaining at that time. In fact, Respondent's annual leave account reflects that he had a total of two hundred and thirty-five hours annual leave accumulated as of the end of the pay period involved, December 13, 1980. The use of annual leave for December 11, as Respondent intended, would only have resulted in the of his annual leave bal-

ance to two hundred and twenty-seven hours. See Exhibit F attached. Respondent's Earnings and Leave Statement.

As is indicated above, Respondent requested the timekeeper prepare an amended time card reflecting eight hours annual leave for Thursday, December 11, and eight hours sick leave for Friday, December 12. Respondent signed and initialed the changes as required. In his haste, resulting from the circumstances described above, he made an unintentional, honest mistake. Had the amended time card been

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properly processed, Respondent would have been advised that his annual leave account was not docked, properly for December 11, 1980. It is Respondent's experience that corrections made by amended time cards are posted on Earnings and Leave Statements within the second or third pay period following the submission of the amended time card. Certainly, if the amended time card had been properly posted, Respondent would have noted the error, reviewed the amended time card and directed that a further amendment be prepared.

As appears from the Report, Respondent's amended time card was apparently received at the OASAM payroll section on or about December 17, 1980. Apparently, that time card, together with the other five amended time cards which Respondent approved at the same time, were intercepted. The time cards were never properly posted on Respondent's Earnings and Leave Statement. In fact, just recently, Respondent was advised that the amended time cards were never properly posted, and were apparently, lost. Respondent's office was asked to prepare another amended time card for each of the employees whose time cards were submitted on December 15. Respondent recently approved each of these time cards.

Had Respondent's amended time card been postsed with the erroneous charge for December 11, 1980, Respondent would have received a Earnings and Leave Statement reflecting this

charge by the sixth or seventh week after the amendment. This would be the first notice Respondent would have that his annual leave was not properly charged for December 11, 1980.

By January 27, 1981 the day of the meeting referred to in the Report, only two pay periods had passed. He had not received and did not expect to receive an Earnings and Leave Statement reflecting the change.

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Given Respondent's experience he would have expected proper crediting of his annual leave for December 11, 1980 on the Earnings and Leave Statement he jwould have received on January 29th or January 30trh, 1981. At that time, Respondent could have caught the error on the amended time card and he would have corrected it.

On January 27th, 1981 Respondent attended the meeting with Clark which was apparently part of the investigation. At this meeting, before Respondent had notice of the error, he freely admitted his status on annual leave for December 11, 1980.d He had no knowledge of the error on the amended time card because the amendment had not been posted on the Earnings and Leave Statement. When shown the time card Respondent freely admitted the oversight.

It ws also apparent from the Report and subsequent information of which Respondent became aware that the amended time cards were lost and never posted. Respondent is uncertain as to how this came about. He is advised by office staff that this was highly unusual. In fact, it may be the method of investigation leading to this charge which resulted in the failure to properly post the amended time card.

Respondent was never advised that his annual leave was not properly charged. Respondent was not given the opportunity, therefore, to notice the error and correct the error. It may well be that the very investigation conducted throughout the latter part of

December 1980 and January 1981 resulted in failure to properly post the incorrect amended time card, and to properly notify Respondent of the error.

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The records reflect Respondent properly used his annual leave. In fact, on one occasion, Respondent utilized his annual leave rather than requesting the administrative leave to which he would be entitled in August of 1980. At that time, Respondent was flying into Albany airport to start his work day. As the result of weather conditions, Respondent's plane was not able to land at Albany airport. The plane was diverted to Hartford, Connecticut, and Respondent, together with the other passengers were transported to Albany airport by bus. This resulted in a delay in Respondent's reporting to work on that day. Under the provisions of the employee handbook, tardiness, when reporting to work, resulting from hazardous weather conditions and the disruption of public transportation, is considered to be administrative leave. An employee under those circumstances, will not lose time, resulting from the tardiness. Rather than take credit for administrative leave in regards to the August 1980 delay, caused by weather conditions, Respondent took six hours annual leave. Exhibit E, attached reflects six hours annual leave on August 11, 1980. Attached also as Exhibit G is verification from U.S. Air reflecting that Respondent's flight #450 was diverted from Albany to Hartford, Connecticut on August 11, 1980, due to weather conditions. Exhibit H is Respondent's airline ticket for that date.

In the preparation of the proposal for adverse action, it appears that the December 11, error is tied together with what is alleged to be a falsification for December 12, 1980, as well. Coupling two dates together, on which alleged falsifications were made, tend to lend credence or support to the charge for each of the separate dates. As will be discussed below, there was no falsification with respect to the amended time card for December 12, 1980. The statements allegedly made by Respondent are inaccurately re-

ported or were misunderstood by Clark. There is no support elsewhere for the statements also allegedly made to Clark.

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SPECIFICATION #2.

Specification #2 charges that Respondent initialed an amended time card showing him on sick leave status on December 12, 1980. The substance of this specification, and the specifications and reasons #2 and #3, are all based on the December 12 incident. An examination of the Report and the attached exhibits reflect a misunderstanding, or misstatement of the facts.

Initially, it should be noted Respondent claims to have been properly on sick leave for December 12, 1980. Respondent admits he directed the time-keeper to reflect eight hours sick leave for December 12, 1980 on the amended time card which he initialed. Respondent submits he is clearly entitled to eight hours sick leave for that date.

As was discussed above, Respondent had been in the process of having substantial dental work performed by a dentist in the Albany, New York area. This included preparation for and fitting of a permanent bridge. This work was commenced earlier in the month and was in process. As the result of this work, Respondent began to suffer some discomfort on Wednesday, December 10, 1980. This discomfort continued on Thursday, December 11. As a result of the discomfort Respondent elected to avoid any further dental work on December 12, 1980. Rather, Respondent chose to return home, take medication for the discomfort and have dental work continued when the pain subsided. In fact, he had been advised that it would be unwise to have the dental work performed while there was soreness or discomfort.

It was the soreness and discomfort from which Respondent suffered on December 12th that was the basis for his claim for sick leave. This usage of sick leave

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is certainly appropriate and in keeping with policy in the terms of the employee handbook.

Specification #2 appears to be based upon a claim that Respondent charged sick leave for December 12, 1980 because of a dental appointment which did not occur. As is indicated above, Respondent's claim for sick leave is not based upon a dental appointment at all. A review of the Report reflects the claim that, on January 27, 1981, Respondent stated that his status for December 12, 1980 should have been that of annual leave. In fact, at the meeting on January 27, 1981, Respondent advised Clark that he was suffering from discomfort and pain resulting from the dental work. For that reason, he did not make a dental appointment, and returned home. During the conversation, Respondent advised Clark since the dentist would not be able to perform any further dental work because of the pain and discomfort, Respondent's returning to Albany, only to fly to Buffalo thereafter, was unnecessary and a needless expense. Respondent chose to return to Buffalo on the earliest available flight on December 12, 1980.

At no time did Respondent ever indicate he claimed sick leave for December 12, based upon a dental appointment. At no time did he advise anyone he had a dental appointment scheduled for that date. The statement in the Report that Respondent stated he should be charged for annual leave for December 12 is incorrect.

As appears from the statement of Patricia Joos, she did not ask Respondent his status for December 12 and was not told by Respondent that he had a dentist appointment on that date. He did advise the time-keeper to charge him eight hours sick leave for December 12. He made no mention of a dentist appointment or the reason. Also, as is indicated in the Report Ms. Joos' recalled. Respondent did indicate,

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during the previous week that he may arrange a dental appoint-

ment for December 12. Plans were not firm at that time. There is no basis for the suggestion in the Report or the charge that Respondent had a dental appointment or claimed to have a dental appointment.

With regard to the substance of Specification #2, the first statement in Specification #2 is correct. The second statement in Specification #2 is incorrect and is not supported by statements from the staff. Respondent never advised Clark on January 27, 1981 that he should be charged with annual leave for December 12, 1980. He did advise Clark that any statement suggesting that he had a dentist appointment was not correct. He did not advise Clark that he was not entitled to sick leave, but should be rather charged with annual leave. Attached hereto as Exhibit I, is a statement from Doctor Arthur Tomlinson, verifying Respondent's frequent visits for dental work during the month of December, 1980. Also attached as Exhibit J, is a copy of Respondent's airlines ticket for December 12, 1980 and the related boarding pass, all reflecting that he departed New York City on December 12, 1980 on Flight #431 from LaGuardia Airport, leaving at 1:55 p.m. This was the earliest available flight that day.

REASON #2.

Reason #2 alleges Respondent directed Patricia Joos to make entries on an amended time card for December 12, reflecting eight hours sick leave. The charge goes on to allege that on January 27, 1981 Respondent claimed he did not know how the card came to be prepared to reflect sick leave for December 12, 1980 when it is clear that he gave these directions.

This charge is a mixture of misunderstandings and the truth, as is apparent from the response to Reason #1,

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Specification #2, above. As is apparent from the attached statement of Patricia Joos, Respondent never gave directions to her with respect to the preparation of a time card, reflecting sick time for December 12, 1980. In fact, Respondent was not asked and

did not give instructions to Ms. Joos as to the entry on the amended time card for December 12, 1980. It is true that the amended time card did reflect eight hours sick time for December 12, 1980. As is explained above, this was based upon the pain and discomfort which Respondent was suffering from dental work which was being done during the month of December, 1980. Respondent properly took sick time for this reason.

On January 27, 1981, Respondent did not advise Clark that he did not know how the amended time card came to be prepared reflecting the sick time entry for December 12. He did indicate that he did not know how the omission occurred with respect to the December 11th charge for annual leave. He never denied knowledge of how the time card reflecting the December 12th entry came to be prepared. While Respondent did advise Clark that he did not have a dental appointment for December 12, 1980, he did not advise Clark that he was not entitled to sick time for that date. In fact, he explained the pain and discomfort which he suffered on December 12, 1980 and the fact that he returned directly to Buffalo, early that day.

REASON #3.

Reason #3 is further based upon the same misunderstanding, an inaccurate recollection of facts, which is not supported by the Report. At Reason #3, it is alleged that Respondent advised Clark that he did not know how an amended time card came to be prepared reflecting sick leave for December 12th. That is incorrect. Respondent did not so advsie Clark. In fact, as is indicated above, Respondent properly claimed sick leave for that date. Respondent never

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advised Clark that he should have been, or was on annual leave on Friday, December 12, 1980.

As appears from the statement of Patricia Joos attached, she did not advise Clark that Respondent directed her to prepare the amended time card reflecting eight hours sick leave for December

12, 1980. and again, although it is true that the sick leave entry for that date is correct, Joos never advised Clark how the entry came to be prepared. Respondent never advised Joos to prepare such an entry.

The last sentence of this charge is ambiguous and puzzling. It is suggested that Respondent's signature on the time card and the information provided by Ms. Joos reflect Respondent's statement to Clark was false. The sentence must be sub-divided for proper response. Respondent never advised Clark that he did not know how the sick leave entry was recorded on the time card. Thus, he never made a false statement to Clark. Further, Ms. Joos never provided Clark with the information which supposedly conflicts with the Respondent's statement. In addition, the information on the time card reflecting eight hours sick leave charged to Respondent is accurate and proper.

Respondent interprets Reason #3 as alleging that Respondent made a false statement to Clark during the course of the investigation, "on a government matter". Respondent denies indicating that he did not know how the December 12th entrywas made. It is apparent that Clark did not have any basis for the claim that Respondent's statements conflicted with the information provided with Ms. Joos. It is further clear that the entry for December 12, 1980 is accurate and appropriate.

THE SURPLUS CHARGE.

Although not set out as a reason with specifications or support, it is also suggested that Respondent should be removed because of the expectation that he be familiar with

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the regulations and that he accurately report hours worked for himself and subordinates. It is alleged that Respondent intentionally falsified his time card. It must be assumed, as nothing additional is alleged at the bottom of page two and at the top of page three of the Notice, that these claims refer back to Reasons #1

through #3. These have been responded to adequately above. There is no further specification and no further facts alleged with respect to intentional falsification. Thus, Respondent proceeds with the understanding that this does not allege any additional basis for misconduct.

This same paragraph again alleges the impact of Respondent's alleged misconduct upon his staff. Again, there is no specification whatsoever that the alleged misconduct had any impact upon Respondent's staff.* In fact, the attached statement of Patricia Joos does not reflect a misunderstanding Respondent's status, on the dates in question,rather Clark misunderstood the information provided to him by the staff. There was no basis and no facts alleged to provide a basis for the suggestion that Respondent's subordinates could not rely upon his equity and accuracy in handling "such matters." Without such specification, Respondent cannot respond properly. We assume that these suggestions or allegations in this paragraph will not be used as a basis for disciplinary action. If they are to be used as a basis for disciplinary action, Respondent requests specification and the information upon which such a charge is based.

Finally, this same paragraph suggests Respondent is being disciplined because the allegations in Reasons #1 through #3 are not the first instance of his displaying poorjudgment in handling administrative management. Reference is made to an adverse action taken suspending Respondent in July of 1979. Respondent is not certain of the import of this ambiguous statement. There appears to be the suggestion that the instant charges are supported by the

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*In fact the premature investigation may have had a more damaging effect.

fact that Respondent was previously suspended for something undated and distinct. Reference to this suspension is inappropriate in the proposed adverse action, unless it is to be considered as a basis for the adverse action. If it is to be considered as a basis for

the adverse action, Respondent is entitled to specification as to how it is relevant to the charges of misconduct contained in Reasons #1 through #3. Rather than do this, the charge contains this statement as a "make weight" allegation.

In fact,the implication appears that, but for Respondent's prior suspension, the proposed adverse action would not be proposed. If this is the case, Respondent is entitled to reasons and specifications, as well as supporting information as to how this suspension supports the proposed adverse action. If the prior suspension is not a basis for the proposed removal of Respondent, it has no place in the Notice of proposed adverse action.

Conclusion

Each of the reasons allegedly supporting removal of Respondent, based upon the claim Respondent falsified a time card, directed an employee to provide information which was false, or that Respondent made a false statement. To falsify is an intentional act. It is incumbent upon someone charging and attempting to prove said conduct, to establish an intent to falsify. In essence, the charge requires proof that the accused knowingly made incorrect entries on the time card for the purpose of benefitting therefrom. While it is clear that, in his haste, Respondent initialed the time card containing one error, the record further reflects he did so innocently. There was no intent to deceive, or to benefit from the error. In fact, at the time, Respondent was not aware of an error.

All of the evidence reflects a harmless error made by Respondent during the course of a busy work dayd while in the process of approving a number of amended time cards.

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It is also clear that the error occurred only with respect to one entry, that of December 11, 1980. Of the four specifications contained in the three reasons, only one specification relates to December 11, 1980. Respondent was denied the notice of the error

by the very investigation of these charges. He was not allowed to correct that error.

As is discussed adequately above, all of the specifications relating to December 12, 1980 are based upon misinformation, or a misconception on the part of the person making the charge.

There is certainly no proof Respondent intended to falsify the time card. More significantly, there is no proof of any act of misconduct which would warrant removal or any disciplinary action of an employee with Respondent's service and record.

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[CONFIDENTIAL]
[U.S. Department of Labor
Occupational Safety and Health Administration]
1515 Broadway, Room 3445
New York, New York 10036

[Reply to the Attention of:] PER (PCS)

REPORT OF INVESTIGATION
SUBJECT: P. Charles Schwender

Following is a chronological record of a situation involving Mr. Schwender's reporting of official time and leave for Dec.11-12, 1980.

(1) December 8-10, 1980 = Mr. Schwender was in New York City to attend a Regional Area Directors meeting which adjourned at approximately noon, Wednesday, December 10, 1980.

(2) December 11, 1980 = Edward Scott, Anthony DeSiervi and I observed Mr. Schwender leaving St. Patrick's Cathedral, on 5th Avenue and 50th Street at about 1:00 p.m. He was accompanied by a female companion and did not appear to see us.

Upon returning to my office, I had inquiries made to determine what Mr. Schwender's status was. Contact was made with the Albany Area Office, the Solicitor's office and our Manhattan Area Office. He had no meetings, and did not appear at any of those offices and did not report to the Regional Office.

My Management Officer, Norman Deitch, called the Albany Area Office about 3:00 p.m. and spoke with the SOMA, Patricia Joos. He was inform that Mr. Schwender neither reported to his office, nor called in. She stated that on the previous Friday evening (December 5), around 5:00 p.m., Schwender told her that he would be in New York the following week for a meeting until December 10, and that he might also go to Solicitor's on Thursday, December 11, 1980. He added that he would "also be out on Friday", December 12, 1980. Ms. Joos informed Deitch that she really was not sure of his itinerary but that she thought he would be

in the Regional Office at least on December 11, 1980. In fact she was surprised that he was not there.

In view of her understanding, Mr. Schwender's time card for the covered period was processed indicating official duty and no leave. It should also be noted that there was a direction for an early submission of time cards because of the Christmas Holiday, and they were prepared and submitted before December 10, 1980.

[CONFIDENTIAL]

[Exhibit A to Petitioner's
3/23/81 Response]

[CONFIDENTIAL]
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At that time I decided to wait and see if Mr. Schwender would submit an amended time card to indicate annual leave for December 11 and 12, 1980. I was also interested in reviewing Mr. Schwender's travel voucher for the period in question.

(3) December 12, 1980 = Deitch briefly discussed this matter with Stephanie Viti of OASAM.

(4) December 17, 1980 = OASAM received an amended time card for Mr. Schwender for the pay period ended December 13, 1980. The amendment was to reflect eight (8) hours of sick leave for Friday, December 12, 1980. The card was initialed and signed by Schwender.

(5) January 12, 1981 (approximately) = Deitch informed Schwender that he must submit his travel vouchers, which were past due for about two years.

(6) January 19, 1981 = Deitch found out from OASAM (Payroll Section) that the amended time card was submitted and obtained a copy of it.

(7) January 26, 1981 = Deitch informed me of the amended time

card and its content.

(8) January 27, 1981 = I travelled to the Albany Area Office to make a personal investigation into this matter. I met with Supervisory Industrial Hygienist Jack Yablonsky who was acting Area Director for the period December 8-12, 1980, SOMA Patricia Joos and P. Charles Schwender. My discussion with each is summarized herewith:

(a) Yablonsky — Schwender did not report in person, nor did he call the office, on December 11 and 12, 1980. He was not aware of any official business or leave plans for Schwender and signed the original time card so that it would be submitted early.

(b) Joos — She stated that on Friday, December 5, 1980, Schwender told her that while in New York City, he might talk to an attorney on Thursday, December 11 and he may have a dentist appointment on December 12, 1980. During the week of December 8 to December 12 when the time cards were completed and mailed, they were not sure what his status was so the time card was submitted showing him in a regular work status. On December 15, 1980 he was asked his status for December 11 and 12 and he said he had a dentist's appointment on December 12, 1980 and to put him on 8 hours sick leave for Friday. Nothing was said regarding Thursday. An amended time card to indicate 8 hours sick leave for that date was prepared and submitted. This card contains both Mr. Schwender's initials and signature.

[CONFIDENTIAL]

[CONFIDENTIAL]
[-3-]

(c) Schwender — I asked him when he returned and he stated December 12, 1980. When asked, he stated, after hesitation, that his status for December 11 and 12, 1980 should be on annual leave and that he was with his sister sightseeing in New York City on Thursday and Friday. When shown the amended time card, he said it was wrong. He said he didn't know how the time card got that way, but that it was wrong.

Roger A. Clark
Regional Administrator

[CONFIDENTIAL]

UNITED STATES DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

In the Matter of
P. CHARLES SCHWENDER

1515 Broadway
New York, New York

March 24, 1981
11:30 a.m.

BEFORE: ROGER A. CLARK
Regional Administrator

[S. & S. REPORTING CO., INC., Court Reporters — Notaries, 132 Nassau Street, New York City, WOrth 2-2915/2943]

[ORIGINAL]

[2]

APPEARANCES:

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES, ESQ
Attorneys for P. Charles Schwender
One Niagara Square
Buffalo, New York 14202
BY: CARMINE R. PUTRINO, ESQ., of counsel

ALSO PRESENT:
P. CHARLES SCHWENDER
NORMAN R. DEITCH
BRUCE ROSENBAUM

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[3]

MR. CLARK: Let the record show those persons in attendance:

Norman Deitch, Management Officer with OSHA;

Bruce Rosenbaum, Personnel Management Specialist with OASAM;

Mr. Schwender, along with his counsel, Mr. Carmine R. Putrino, attorney.

I have been designated to receive your oral and/or written response to the proposed adverse action concerning Mr. Schwender.

MR. PUTRINO: Yes, and if I may begin, there is —

MR. CLARK: Let me just add a couple of things.

MR. PUTRINO: Of course.

MR. CLARK: A copy of the proceedings, as you know, is necessary to be made, but rather than doing it in longhand, the method I have chosen is to have a recorder here present to record the conversation.

MR. PUTRINO: All right.

MR. CLARK: After the completion,

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I will be forwarding the record to Mr. John Miles, Director of the Office of Field Coordination in Washington, D.C.

Now, will you please proceed.

MR. PUTRINO: First, before I get into the merits, I have had prepared a letter of enclosure to accompany that and to be sent to Mr. Miles.

Apparently, I left my office with nothing but the carbon copy of the letter of enclosure.

Therefore, what I would like to do if I can is to call my secretary and have her put it in the mail to you this afternoon and you shall have it tomorrow.

MR. CLARK: Fine. I will attach it to a copy of this document.

MR. PUTRINO: We have provided you with a seventeen-page written response to the three reasons and four specifications together with ten exhibits that support our response.

What I would like to do is review the reasons and the specifications

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for the proposed adverse action, but just to touch upon what I think are the high points of our response as most of what I am going to say is in the written response, although some of it, I think, deserves some highlighting.

Initially, what I would like to point out that, three of the specifications deal with the December 12th incident concerning sick leave.

One of the specifications, in fact, one of the reasons just deals with December 11th.

I'm going to deal with December 12th first, partly because it seems to be of a greater significance and, also, because I think it is more easily explained and we can get by that.

The December 12th incident concerns a notation, a claim for sick leave on December 12, 1980, during the week that Mr. Schwender was away from the office.

Reason one, specification two, suggests that Mr. Schwender initialled

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the time card showing that he was on sick leave on December 12, 1980, to attend a dentist appointment and when, in fact, he had no dentist appointment at that time; and when in fact he indicated to you on January 27, 1981, that he should have been on annual leave for December 12, 1980.

Our response to that is, first of all, Mr. Schwender was properly on sick time for December 12, 1980, not as a result of a dental appointment, but as a result of the pain and discomfort that he was suffering as a result of dental work that was being done during that period of time.

With respect to the specific allegation in specification two, Mr. Schwender denies telling you that he should have been on annual leave for December 12, 1980.

He specifically did tell you that he should have been on annual for December 11, 1980, and, perhaps, the discussion with respect to that was misunderstood, but he did indicate that he was properly on sick leave for December 12, 1980.

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[7]

The reason for that is outlined in our written presentation.

During the month of December and just prior, Mr. Schwender had begun treatment for some substantial dental work.

In fact, part of it involved the installation of a permanent bridge.

He had had this work started during the week before he attended the area meeting, that is December 8th through the 10th, and had indicated to some of the staff that he would try and ar-

range a dental appointment on Friday, December 12th, if that were possible.

I think that is confirmed in the specification, confirmed by Patricia Joas.

On December 12th after Mr. Schwender had completed a call with one of the solicitors in the OSHA Regional Office, he determined that because of the pain and what he had been advised by the doctor that it would be useless to fly back to Albany, to his dentist, where the dental work was

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being done, because he did not expect the dentist to be able to continue with the work necessary on the bridge because of the pain that he was experiencing at that point and it would be necessary to then fly back to Buffalo, which is his residence, and as you know, he resides in the Buffalo area and is commuting to the Albany location.

So rather than fly back to Albany, Mr. Schwender took the first available flight to Buffalo, which left somewhere around 1:00 o'clock in the afternoon.

There is an exhibit attached to the written response reflecting:

A, the dental work by his dentist; and

B, his flight, and that is his ticket, for the return flight that afternoon on December 12, 1980.

Now, the remaining specifications.

In reasons two and three, also, deal with that.

MR. CLARK: Could I ask you one question?

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MR. PUTRINO: Yes.

MR. CLARK: You indicated that he talked to an attorney here on December 12th?

MR. PUTRINO: Yes.

MR. CLARK: What attorney was that?

MR. SCHWENDER: Mr. Cintron.

MR. PUTRINO: Mr. Cintron.

MR. CLARK: Is that one of our own attorneys?

MR. SCHWENDER: Yes.

MR. PUTRINO: One of the Solicitor's attorneys.

MR. CLARK: Go ahead.

MR. PUTRINO: With respect to reason two.

Reason two alleges that Mr. Schwender directed a subordinate to prepare an amended time card with information which is false.

I think this is based upon some misinformation or a misconception of information that was provided to you.

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Attached as a part of it, as an exhibit to the statement, is a statement by Patricia Joas indicating that she did not talk with Mr. Schwender on December 15th concerning the preparation of his time card;

And she was not given any direction of any kind as to the preparation of Mr. Schwender's time cards.

So we have with respect to the charge an apparent misconception of information which may have been given by Ms. Joas or a

misunderstanding of information that was given by Mr. Schwender.

In the first sentence, it is stated that Patricia Joas asked Mr. Schwender what entry to make on the time card.

As we have indicated, she denied asking him, Mr. Schwender, or receiving any instructions that Mr. Schwender asked her how to prepare the entry for December 12th.

The second sentence states

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that Mr. Schwender directed her to prepare an amended time card showing eight hours sick leave for December 12th.

Again, she did not have a conversation with Mr. Schwender, so that did not take place.

Mr. Schwender did, however, as we indicated in response to specification two, Mr. Schwender did direct the timekeeper to show eight hours' sickleave for December 12th.

Again, we take the position that that was certainly appropriate not because of a dental appointment, but because of the reasons that we have explained.

In connection with specification two, the next sentence says: When questioned by you on January 27th, Mr. Schwender stated that he did not know how the sick leave came to be noted on the card when he gave instructions on December 15th to Ms. Joas to prepare the card for annual leave.

That is a difficult statement to come to grips with because we have to

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take it part by part.

On January 27th, Mr. Schwender did tell you how the December 11th entry came about and that the December 11th entry was, in fact, incorrect.

He did tell you that on December 12th he was on sick leave, and he was properly on sick leave and he should have been on sick leave, and he gave instructions that the time card should be so noted.

He did not give instruction to Ms. Joas with regard to any of this;

And to our knowledge, he did not indicate this to you in your meeting with him on January 27th.

He did advise you, and this is the last part of this sentence, he did advise you that he did not have a dental appointment on that date;

That is, also, correct.

With respect to the specifications as it fits into the charge, the record reflects Ms. Joas' statement in particular, reflects that he did not direct

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her to prepare an amended time card for December 12th and he certainly did not direct her or anyone else to prepare an amended time card based on false information.

The information that was reported that is, the underlying reasons for the December 12th sick leave entry was the pain and discomfort that Mr. Schwender was suffering from as the result of the dental work that was done at that time, and not because of the dental appointment.

Reason three again relates to December 12th.

Reason three, I think, may best be explained by taking it sentence by sentence, because it involves again conversations, records and, perhaps, again a misunderstanding.

It says: It is alleged in reason three that on the ??th you asked Mr. Schwender why the amended time card was submitted showing sick leave on Friday, when he advised you that he was on annual leave on Friday, December 12th;

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In fact, he was not on annual leave on December 12th, he should not have been on annual leave on December 12th, and he did not indicate that he should be on annual leave on December 12th.

The next sentence says that he indicated to you that he did not know how this sick leave entry came about.

Again, he did not indicate, he did not know how the December 11th entry, that is, the duty status entry came about.

He did not indicate that with respect to the sick leave entry on December 12th.

The next sentence states that on January 27th, Patricia Joas advised you that she and the timekeeper had asked about entries for December 12th and that she was advised by Mr. Schwender to prepare an amended time card reflecting eight hours' sick leave.

Again, we have responded that Ms. Joas indicated that she did not have a conversation with Mr. Schwender regarding the sick leave or the preparation of the

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amended time card.

Also, she says in her statement attached that she did not advise you of any conversation between you and Mr. Schwender, between her and Mr. Schwender as to the preparation of the time card.

Again, the preparation of the time card for sick leave or charging sick leave on December 12th is accurate.

The last sentence indicates, it states Mr. Schwender's signature on the time card and the information provided by Ms. Joas documents that Mr. Schwender's statement to you was false because he did know how the amended time card came to be prepared.

Again, we have to take that apart.

Again, Mr. Schwender did not indicate that the xxxxxx the time card was incorrect.

Ms. Joas did not indicate that she had contrary information of any conversation with Mr. Schwender, and there

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was no false entry or incorrect entry on the time card for December 12, 1980.

I think the three of these specifications, which are a part of the reasons one through three, are based upon the discussion of reason one, specification one, December 11th, was at the same time as the December 12th entry of the time card was discussed and we assume that the misconception arose because both dates and both entries were discussed at the same time.

But to capsulize as to all of these, all of these specifications dealing with December 12th, there is no doubt that Mr. Schwen-

der was properly entitled to sick leave because of what, in essence, would be a toothache, the dental discomfort, that is, what he was suffering from as a result of dental work.

There is no doubt that he did not indicate to Ms. Joas that he had a dental appointment or that he should be credited with sick leave because of a dental appointment, although he did indicate to

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the timekeeper that he should be credited with sick leave not because of the dental appointment and with respect to the conversation that he had with you and which is reported in the report which is attached to Exhibit A, where Mr. Schwender advised you that there was an error with respect to the December 11th annual leave notation, but he never claimed that he should have been on annual leave for December 12th and he never claimed that the December 12th entry was incorrect or that he had a dental appointment when in fact he did not have a dental appointment.

I think it is important as far as our response to the charge that will be reviewed by Mr. Miles to note that I believe the preparation of the charge is such that charge one and charge two, that is December 11th and December 12th entries were put together because together they give the appearance, perhaps of anything radically wrong whereas, perhaps any one of them individually is a simple instance

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of misunderstanding or an error on somebody's part.

However, the records that we have, I think, reflects that the December 12th incident is clearly no basis for any kind of proposed adverse action;

It clearly is no basis for adding the weight of the December 12th incident to the December 11th incident.

Now, I would like to turn to the December 11th incident, which is reason one in specification one.

At this point it is alleged that Mr. Schwender falsified an amended time card by initialling and signing an amended time card reflecting that he was on duty status on December 11th when in fact he was not.

The report that was provided to us as the only documentation or support for the charge reflects the statement by Ms. Joas in Paragraph 8-B, and also a statement by Mr. Schwender at Paragraph 8-C.

On January 27th, Mr.

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Schwender had a meeting with you in his office regarding the investigation that was apparently going on, an investigation that he was not aware of until your visit that day.

During the course of the conversation with Mr. Schwender he was asked what his duty status was on December 11th and he freely and candidly admitted to you that he was on annual leave.

This he did before you or anyone had brought to his attention that there was any claim that his time card — that is his amended time card was not properly made out, or any claim that he had apparently falsified the time card.

After he told you this, as you may recall, you commended him and thanked him for being honest.

In the conversation then you pointed out the fact that there was an amended time card that reflected an eight-hour duty status with no charge with respect to annual leave, and that the other

entries on his

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time card were initialled and that the time card was signed by Mr. Schwender, therefore suggesting that he intended, and I think it is stated later on in the charge that he intentionally falsified this entry in the time card.

We would begin by pointing out that Mr. Schwender did not direct Ms. Joas as directed in the statement, in the report, to prepare the amended time card in any fashion.

We have covered that with respect to the December 12th incident.

Mr. Schwender did direct the timekeeper to prepare an amended time card on Decmeber 15, and that amended time card was to have reflected: December 11th, annual leave; December 12th, sick leave.

When Mr. Schwender received the amended time card, he received it together with five other amended time cards, and they are attached and made a part of this as Exhibit D.

I reviewed all six of the

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amended time cards, the initialled two changes made on his amended time card, and the other five amended time cards.

When he initialled the amended time cards, that is, his own initials to correct or make two amendments, I should say, he expected two amendments, one for Thursday, December 11th and one for Friday, December 12th, he initialled them quickly.

Therefore, in his haste to initial them, he neglected to note that the two amendments that he was initialling were not for the two dates involved.

One was for a one-hour sick leave that he claimed in the previous week, again for dental work;

And one was for Friday, December 12th, which was for sick leave, and which was correct.

He signed, he initialled that time card; he signed his time cards, together with the other five time cards in a matter of a few minutes at most and he did them because they were presented to him by the

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timekeeper as a perfunctory function that he performed all of the time.

At the very most there's no question that an error was made;

There is no question that an error was made, which Mr. Schwender should have caught;

And therefore, we would submit that there's no question that Mr. Schwender was guilty of an oversight or he was guilty, perhaps, of acting too quickly and not reviewing the time cards that he was initialling as thoroughly as he should have.

However, this is nothing given the circumstance that you can conclude that Mr. Schwender intended to falsify a time card, but the record reflects that Mr. Schwender directed the time card for December 11th to be prepared at the same time that he directed the December 12th entry to be made.

The December 11th entry was incorrect and they did not catch it.

That's all that the record

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establishes with respect to this charge.

We would, also, point out that it is Mr. Schwender's experience and in fact the experience of the Albany office that corrections made by the amended time cards are usually reflected in an Earnings and Leave Statement which is received within a two- to three-payroll period.

If there be any corrections necessary, he would have caught that by the third payroll period, which would be the latter part of January or the early part of February.

In other words, the incorrectly amended time card that is showing him on a duty status on December 11th, had it been properly processed, would have been something that would have turned up in his Earnings and Leave Statement which is received in the latter part of January or the early part of February.

As it turned out, those time cards, Mr. Schwender and the other five amended time cards that he signed on, on

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the same day, were never posted.

I fact, they were lost and it was only a couple of weeks ago that the Albany office realized that all of those time cards were lost because the other five employees who were looking for their Earnings and Leave Statements for their corrections which had been made as Mr. Schwender would have noted that the corrections had not been made as of yet.

When this happened, they brought it to the attention of Darlene Burdick, who was the timekeeper.

When this was found out that there were no Earnings and Leave Statements reflecting the amendments, she spoke to the Payroll Office in New York City and it was told to her that they never received the amended time cards.

In fact, those amended time cards, including Mr. Schwender's incorrectly amended time card, was never received or posted.

As a result of this, Mr. Schwender

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never received a Earnings and Leave Statement either before his meeting with you on January 27th, or after, showing that the sick leave was correct, but the annual leave was not.

He never received any notice that the incorrect entry had been made.

As it turned out, he had the meeting with you on January 27th, before or about the same time I should say that he would have received the Earnings and Leave Statement that should have contained the amendment and did not.

Had he received an Earnings and Leave Statement in late January or early February, had it shown sick leave credits for December 11th and not for December 12th, Mr. Schwender would have then been able to bring it to the attention of the timekeeper who would have made the appropriate correction.

As it turned out, it never happened because Mr. Schwender's time card and the other five time cards were lost.

As it turned out, also, the Albany office was aware of the fact that

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the other time cards were lost because of the very scenario that I just described to you, that is, the employees who were expecting the amendments on their Earnings and Leave Statements never got them and they brought it to the attention of the timekeeper who double checked.

Mr. Schwender has since signed newly amended time cards, which were resubmitted about a week ago.

MR. SCHWENDER: About three weeks ago.

MR. PUTRINO: I'm sorry, three weeks ago.

Yes, this was three weeks ago now.

MR. CLARK: Mr. Schwender has submitted another amended time card for the period in question?

MR. PUTRINO: He has resubmitted all of the amended time cards.

MR. CLARK: As they were originally submitted or have they been changed again?

MR. SCHWENDER: No, I corrected

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the error that was originally submitted.

MR. CLARK: Even though I told you not to do anything with that time card?

MR. PUTRINO: Let me answer on that.

Mr. Schwender was asked by the Payroll Department — I should say the Albany Office was told by the Payroll Department that the amended time cards had to be resubmitted, that none of them had been received.

The timekeeper at the Albany office had prepared the amended time cards and they were signed and resubmitted by Mr. Schwender, after he discussed with me — discussed your direction.

As I understood your direction at the January 27th meeting prior to the Notice of Proposed Adverse Action, you had directed Mr. Schwender that resubmitting an amended time card and a second time card, was unnecessary and at the very least it would be done once the adverse action was

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commenced.

At my direction, I advised Mr. Schwender that he should not take the chance of resubmitting the incorrectly amended time card because he would run the risk of jeopardizing his position again, and that is the reason for doing so.

Finally, with respect to the December 11th amendment, I would like to point out that that standing alone is really all you have because the December 12th is a pure misunderstanding and we have to look at the December 11th incident as a single incident.

If you would look at the December 11th incident as a single incident and ask yourself why would Mr. Schwender do this; what possible gain is an eight-hour credit of annual leave when he had two hundred and thirty-five hours of annual leave at that time.

He didn't need annual leave; he didn't need to jeopardize his job when he had that much annual leave available

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to him.

This was again a situation that was purely harmless unintentional error, an oversight but certainly nothing that would demand the leveling of a falsification charge.

We would like to cite one occasion in August of 1980 when Mr. Schwender was entitled to six hours of administrative leave because of a flight into Buffalo, the start of his work week was delayed because of weather conditions.

Rather than to take administrative leave, he took annual leave.

There is a copy of the work sheet in there as an exhibit attached, reflecting that he took annual leave for that date inAugust rather than to charge it to administrative leave and accumulate additional annual leave, which appears to be the suggestion.

We submit here that at the very most with respect to December 11th standing alone, you have an incident of

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a person who, perhaps, because he relied too heavily on his timekeeper, he signed and initialled a time card, he forgot to initial one entry or forgot to check one entry on that time card for December 11th.

There is no basis here to consider the terminating of the employee or the removing of the employee.

In fact, there is no basis here for doing anything other than to tell the employee you'd better be more careful the next time.

If the purpose of the dispatches, dealing with the employee-employer relationship, if the purpose, I should say the tenor of the Notice of Proposed Adverse Action is, also, clear, I think the suggestion is Mr. Schwender is being given some form of progressive discipline, but that just astounds me.

In fact, it is shocking and even assuming the truth of all three

reasons in all four specifications, that the proposal would be removal under these circumstances,

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now it is shocking to me that the proposal would be removal given the facts here where there was a simple misunderstanding.

As to the December 12th incident, the misunderstanding between yourself, Ms. Joas, yourself and Mr. Schwender.

With respect to the December 11th incident, it is incomprehensible that you could consider terminating somebody or removing somebody or bringing any disciplinary action based upon an innocence and a harmless error or an oversight.

Finally, I should like to call your attention to some other disturbing comments that are in the letter, and this has arisen because I had made requests for information of any specifications or reports that were relied upon.

The only information that I was provided was your report that is attached to my written Answer as Exhibit A.

There is nothing in your report, that is, nothing in the specifications dealing with the claim that Mr. Schwender, and I

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quote: Conduct, whatever that means, has had an impact on the staff.

At the top of page three of your letter of February 11th, you state: I, also, considered the effect on your staff of such actions to be potentially damaging since your subordinates must be able to rely on your equity, accuracy in handling all such matters.

If that was intended as a separate reason and specification, I think we are entitled to know that;

And we have no basis for determining what alleged impact on the staff there may have resulted.

We know of none.

We submit, that, Ms. Joas' statement negates the suggestion that there was any misunderstanding on her part or the staff's part.

Therefore, any question on her part, certainly of Mr. Schwender's accuracy when it came to these matters, we see no basis in anything that was provided to

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us and there is no specification as to that.

Finally, the last and equally disturbing reference in the letter of February 11th is the reference to the prior disciplinary action; that is, the sixty-day suspension issued to Mr. Schwender.

In that regard, that arose as the result of an incident that took place, according to the specifications at that time, years before it was finally resolved in 1979.

It concerns something that is completed unrelated to the incident that is involved here.

It is, we submit, inappropriate to use that either as a basis for further disciplinary action or to add weight or to make weight for the disciplinary action.

If it is the intention to rely on that as a part of the basis for the adverse action, we believe we are entitled to that, to have that set forth as a reason with specifications.

We, also, believe however,

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that once that matter had been resolved by the Merit System Protection Board as it was, the Agency's action was challenged, but the Merits System Protection Board resolved it by them in July of 1979, that was resolved; and whatever was the penalty that they determined appropriate, that was the final decision which was binding on all parties.

Therefore, it is inappropriate to then use that as a basis for issuing additional disciplinary action to Mr. Schwender, because whatever misdeeds or wrongdoings, or mistakes that were involved, it has been paid, the price, and it is inappropriate to rely upon that here.

The letter that I am sending to Mr. Miles, also, which I hope will be a part of the record, relates some objections, that we have made earlier with respect to the procedures.

For the record, I would like to just detail those three objections.

We believe, first of all, that this matter given the nature of the

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charges, was handled in such a way as not to afford Mr. Schwender sufficient time to assemble all of the material necessary, although we believe we have assembled a considerable amount of material which supports our position.

We, also, have objected to your selection as the person to receive the oral presentation.

We base that on, and we have outlined that earlier in a telephone conversation, we base that partially on the fact that under the personnel manual, we believe that we are entitled to make the

presentation to someone who on the basis of all the information will make the recommendation to Mr. Miles.

Obviously, we do not believe it appropriate that the person who is proposing the adverse action be the person who is receiving the information; and, therefore, making a recommendation to Mr. Miles.

With respect to the proposed adverse action, we think in this case it

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is even a graver significance because the investigation in this case was conducted, apparently, primarily by you and the basis for the various claims of misdeeds are primarily conversations between you and staff in Albany or you and Mr. Schwender and we think it is unfair;

It is an unfair burden placed on Mr. Schwender and yourself to require that this kind of a decision be made by you and that Mr. Schwender be forced to rely on this kind of a decision.

MR. CLARK: I have nothing to add.

Let the record be closed.

(Whereupon, at 12:20 p.m., the within proceedings terminated.)

* * *

I hereby certify that the foregoing is a true and accurate transcript of the minutes of this hearing.

[Signature]
Clarence Edward Parker — Hearing Reporter

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[MAY 12 1981]

[Lipsitz, Green, Fahringer, Roll, Schuller & James/Attorneys at Law/One Niagara Square/Buffalo, New York 14202/716 849-1333/New York City Office/540 Madison Avenue/New York, New York/212 751-1330]

May 8, 1981

Mr. John B. Miles
Director - Field Co-ordinator
U. S. Dept. of Labor
O.S.H.A. Room N-3603
200 Constitution Avenue, N.W.
Washington, D. C. 20210

Re: (Per PCS)

Dear Mr. Miles:

This office represents P. Charles Schwender in connection with the above referenced proposed adverse action.

In accordance with the appropriate rules and regulations, my client has previously submitted a written response and made an oral presentation to the charges. Thereafter the transcript and my client's written submission was apparently forwarded to your office for a decision.

On May 4th, 1981 my client was advised that Norman Deitch was directed to contact Ms. Darlene Burdick, a former employee in the Albany Regional OSHA office. He was advised that the purpose of this contact would be to obtain information verifying facts alleged as a basis for the proposed adverse action.

Thereafter I called Mr. Dietch and advised him that we believe such an interview or further investigation in this matter at this time is inappropriate and a violation of the applicable rules and procedures. It denies my client protections and benefits guaranteed by statutes and regulations.

Mr. John B. Miles
re: Charles Schwender -2- May 8, 1981

I would urge you consider this objection and direct the appropriate officers and employees to discontinue the reopening of the investigation.

Very truly yours,

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES

By:

Carmin R. Putrino

CRP: em

bcc: P. Schwender

[U.S. Department of Labor/Occupational Safety and Health Administration/1515 Broadway] - Room 3445 [New York, New York 10036/Reply to the Attention of:] PER (PCS)

May 29, 1981

Mr. P. Charles Schwender
105 Chapel Wood
Williamsville, New York 14221

Dear Mr. Schwender:

The purpose of this letter is to amend my notice of proposed adverse action dated February 11, 1981, in which I proposed to remove you from your position and the Federal service to promote the efficiency of the service. Except for the specific changes noted below, all the information communicated to you in and with my February 11, 1981, proposed adverse action remains active, in full effect and unchanged.

The amendments to my letter of February 11, 1981, follow:

Specification 1 for Reason 2: On December 15, 1980, the Albany Area Office timekeeper, Ms. Darlene Burdick, asked you if you took any leave during the week of December 8 through 12, 1980, in order that she could complete an amended time card for you for the pay period ending December 13, 1980. You told Ms. Burdick to show eight (8) hours of sick leave for Friday, December 12, 1980, on your amended time card. You did not tell Ms. Burdick to show any amount or type of leave for Thursday, December 11, 1980. You initialled and signed this amended time card on December 15, 1980. You directed a subordinate employee to prepare an amended time card with information which was false; you were not in a duty status on Thursday, December 11, 1980, and did not take positive action to charge appropriate leave for that day.

Reason 3: You made false statements in Government matters.

Specification 1: In a meeting in your office on January 27, 1981, you advised me that you had been sightseeing with your sister in New York City on December 11 and 12, 1980, and that your leave status for those two days should have been annual leave (for both days). I showed you the amended time card that had no type or amount of leave charged for December 11, 1980 and eight (8) hours of sick leave charged for December 12, 1980. You said the card was wrong. You said that you did not know how the time card got that way, but that it was wrong. You made a false statement to me in telling me that you did not know how the time card got that way [i.e., no charges to leave on December 11 and a charge to sick leave for December 12] because you had provided your timekeeper, Ms. Burdick, on December 15, 1980, the information as reflected on the amended time card.

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Attached to this amendment to the February 11, 1981, proposed adverse action are three signed statements. I am making all three a part of the record of this proposed adverse action and these statements are being relied upon in proposing this action, along with all other materials previously received by you and submitted by you in relation to this proposed adverse action. The three statements, submitted by three individuals, Ms. Mary Patricia Joos, Ms. Darlene Marie Burdick, and me are attached to this amendment. Additionally, I have attached a copy of the final decision rendered by the Merit Systems Protection Board (MSPB), dated December 12, 1979, in which the MSPB affirmed the Agency action to suspend you for sixty (60) calendar days for willful misuse of a government-owned vehicle in violation of 31 U.S.C. 638a(c)2 and DLMS 7, Chapter 400 #405. As you recall, I informed you in my February 11, 1981, notice that your past disciplinary record would be considered by Mr. Miles in reaching his decision in this matter; I have provided this MSPB decision to you for reference.

You have the right to answer all aforementioned reasons and spec-

ifications, both in this amendment and those unchanged from my February 11, 1981 letter, and address the above mentioned statements, both orally and in writing and to furnish affidavits and evidence in support of your answer. Your written reply or request for an oral reply must be received by Mr. John B. Miles, Jr., the OSHA Field Coordinator, within fifteen (15) calendar days from the date you receive this amendment to the original proposed adverse action. Consideration will be given to extending this notice period if you submit a request to Mr. Miles, giving your reasons. Any written reply or request for an oral reply should be addressed to Mr. John B. Miles, Jr., OSHA Field Coordinator, 200 Constitution Avenue, N.W., Room N-3603, Washington, D.C. 20210. Mr. Miles can be reached by phone on FTS 523-7725 or commerical (202) 523-7725. No final decision will be made in this matter until your reply, or replies, have been received and considered, or, if no written reply is received or oral reply requested, until thirty (30) calendar days have passed from the date you receive this notice. Any replies submitted by you will be given full consideration, and you will be notified in writing of the final decision reached by Mr. Miles.

You have the right to be represented by an attorney or other representative of your choice, unless such choice presents a conflict of interest or position, unreasonable cost to the Government or the Government has a priority need for the services of an employee who wishes to also serve as your representative. Within five (5) calendar days of your receipt of this notice, please notify Mr. Miles of your designation of representative.

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You have received all materials relied upon in proposing the adverse action dated February 11, 1981. The sixty day suspension disciplinary action taken against you in 1979 for willful misuse of Government owned vehicles, was not, of course a specification, but will be considered by Mr. Miles in reaching his decision in the current matter. The MSPB decision of December 12, 1979, is

provided as an enclosure to you for reference and the record. I have attached all new materials relied upon in composing this amendment to the February 11, 1981, adverse action. If you wish to review the (same) materials on file in my office or other pertinent documents, to secure affidavits, to interview OSHA or other Department of Labor employees concerning pertinent matters, and/or to prepare a written reply, you will be allowed reasonable official time in which to do so. In addition, you will be allowed official time to make an oral reply, if you wish to make one. You should contact me to request and arrange for the use of reasonable official time; in my absence, you must make such arrangements with the Deputy Regional Administrator, Nicholas DiArchangel.

If you do not fully understand the reasons cited in this amendment to the proposed adverse action of February 11, 1981, you may contact Mr. Bruce Rosenbaum, OASAM Personnel Management Specialist on FTS 662-3083 or commerical Area Code 212 - 944-3083.

You will be retained in a full pay and duty status during this advance notice period except for such periods as you may be absent on leave at your request and approved by me.

Sincerely,

[Signature]
Roger Clark
Regional Administrator

Enclosures:
Statement by Mary Patricia Joos
Statement by Darlene Marie Burdick
Statement by Roger Clark
MSPB decision of December 12, 1979

[U.S. Department of Labor/Occupational Safety and Health Administration/Washington, D.C. 20210/Reply to the Attention of:]

[JUN 4]

Lipsitz, Green, Fahringer, Roll,
Schuller and James
Attorneys at Law
One Nigara Square
Buffalo, New York 14202

Dear Mr. Putrino:

This is in response to your letter of May 8, 1981, concerning the proposed adverse action pending against your client, Mr. P. Charles Schwender.

Mr. Roger Clark, New York Regional Administrator and management official proposing to remove Mr. Schwender from his postion and the Federal service, was directed by me to obtain affidavits from key personnel in order that clarification of events could be achieved. I directed Mr. Clark to do so since the record was not clear to a degree that would reasonably assure that I could render a fair and equitable decision in this matter.

Mr. Schwender will be given an opportunity to review statements and sufficient time to submit an additional oral and/or written reply, or both. Such actions are provided for in applicable Office of Personnel Management regulations and Department of Labor regulations. Ms. Gerri L. Piatt, OSHA Personnel Officer provided you copies of these regulations on March 10 and 17, 1981, upon your requests of February 24 and March 12, 1981.

To date, I have not made any decision concerning the proposed adverse action involving Mr. Schwender. Further, I assure you that Mr. Schwender will be provided every procedural right and privilege available to him under applicable rules and regulations.

Sincerely,

[Signature]
John B. Miles, Jr.
Field Coordinator

[Lipsitz, Green, Fahringer, Roll, Schuller & James/Attorneys at Law/One Niagara Square/Buffalo, New York 14202/(716) 849-1333/New York City Office/540 Madison Avenue/New York, New York 10022/(212) 751-1330]

July 2, 1981

Mr. Roger A. Clark
Regional Administrator
U. S. Dept. of Labor
O.S.H.A.
1515 Broadway, Rm. 3445
New York, New York 10036

Re: PER (PCS)

Dear Mr. Clark:

On behalf of my client, P. Charles Schwender, I am submitting the following as a written reponse to the amended portions of the proposed adverse action, which amendments are contained in your letter dated May 29th, 1981. I am addressing this response to you upon the instructions of John Miles, the Field Coordinator.

The response will be divided into two sub-sections. The first will deal with response to what appears to be or new allegations or changed specifications in the amended notice of the proposed adverse action.

The second portion of this response will deal with the numerous apparently continuing procedural irregularities in violation of my client's right to due process in this matter. Obviously, all of the information and response previously submitted to the original notice of proposed adverse action should be considered. We also urge consideration of the oral presentation made on March 24th, 1981 and the various pieces of correspondence raising the procedural irregularities throughout this matter.

RESPONSE TO THE AMENDED REASONS & SPECIFICATIONS

Reason #1, Specification #1 is apparently not affected by the amendment. Thus, except to the extent that the matter referred in Reason #1, Specification #1 arises elsewhere in the amended notice of proposed adverse action, Respondent sees no need for further response.

At the start of the oral presentation in this matter, we pointed out that only a portion of Reason #1, or one of the four specifications related to the December 11th, 1980 entry

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on the amended time card. Obviously, in response and after the fact, you took the opportunity to change the specifications. It appears now that December 11th, 1980 is now referred to in Reason #2 and #3, as well. Thus, the notice of the amended proposed adverse action is not in fact an amendment. Rather, the new specifications deal with charges or accusations not previously made.

Reason #2, Specification #1 is first amended by the elimination of the allegation that Patricia Joos asked the Respondent what entries to make on the amended time card. When it became apparent to you at the oral presentation that you must have misunderstood Ms. Joos' statement to you on January 27th, 1981, this specification was changed. The specification now reflects that the timekeeper, Darlene Burdickd, asked Respondent how to complete the amended time card.

The second change in the specification for Reason #2 relates to the allegation that Respondent directed Patricia Joos to prepare an amended time card showing eight hours sick leave for December 12th, 1980. The new specification reflects that Respondent directed Ms. Burdick to show eight hours sick leave for Friday, December 12th. 1980 an that he did not tell Ms. Burdick to show any amount of leave for Thursday, December 11th, 1980. Thus, December 11th, has now been added to this Reason and Specifica-

tion.

The statement apparently recently taken from Darlene Burdick reflects that she spoke with Respondent on December 15th or 16th about an amended time card. Her statement indicates Respondent told her to show eight hours sick leave for Friday, December 12th, 1980. She states that Respondent did not mention Thursday, December 11th. As a result the time card was prepared, as previously discussed.

As is indicated in the original response, Respondent had previously advised Patricia Joos that he planned to discuss a case file with one of the O.S.H.A. solicitors in the Regional Office in New York City on December 11th, 1980. In fact he did so. On the morning of December 11th, 1980 Respondent called Ramon Cintron, an attorney on staff of the Regional Solicitor's office in New York City. Respondent called to discuss a file involving the Bendix Corporation and was told that Cintron was out of the office at that time. As a result, Respondent made no effort to visit the Solicitor's Office in person. In fact, Respondent later spoke with Cintron.

Attached as Exhibit K is an affidavit, sworn to by Ramon Cintron, dated June 19th, 1981, stating in part:

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"My recollection is that I had a telephone conversation with him (Schwender) wherein we discussed among other things an F.O.I.A. request his office had received. I recall speaking with him again regarding that F.O.I.A. request. I do not recall the specific date or dates of those telephone conversations. However, I made notations on the calendar that lead me to believe that those conversations probably took place on December 11th and/or 12th, 1980."

As we originally indicated, when Respondent could not meet with Cintron, as he had previously planned, he decided to remain in New York and take the day as annual leave, which was his

right.

Respondent recalled a conversation with Darlene Burdick during the following week concerning the preparation of an amended time card. The conversation was with Ms. Burdick alone, in his office, at his desk. The conversation was beyond the point at which anyone outside the office could have overheard the very brief discussion.

In fact, to describe the brief exchange as a conversation is in fact misleading. Respondent recalls Ms. Burdick mentioning that an amended time card had to be prepared for the previous week. She indicated she wanted to clarify whether Respondent was don leave status on December 11th and 12th, 1980. He answered "yes" referring to annual leave for December 11th,1980. He then specifically referred to a charge for eight hours sick leave on Friday, December 12th, 1980, diffferentiating from his status on December 11th. There was nothing further to the conversation.

Contrary to the information contained in the statement of Patricia Joos, Respondent never advised Burdick that no time should be charged for Thursday, December 11th, 1980. Rather, Respondent affirmatively answered the question he was asked concerning his leave status on Thursday, December 11th, 1980 and specified sick leavae for Friday, December 12th, 1980 because Burdick was apparently unaware of that. Further, the statement of Darlene Burdick confirms Respondent's recollection of the conversation and clearly conflicts with the conversation allegedly overheard in part, by Ms. Joos. Ms. Burdick's statement reflects:

"He told me to show eight hours of sick leave for Friday, December 12th, 1980. He did not mention Thursday, December 11th, 1980."

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Respondent's recollection of the brief conversation with Ms.

Burdick is very similar to that described in her statement. As originally indicated, Respondent recalls Ms. Burdick asking him whether he should be charged for leave for the previous week. Thinking she was referring to annual leave, Respondent answered "yes". d Because she appeared to be aware of the annual leave but not sick leave, Respondent differentiated his status for Friday, December 12th, 1980. He specifically told her to be sure and charge eight hours for sick leave on December 12th, 1980.

Clearly, Respondent did not affirmatively tell Ms. Burdick to charge no leave time for December 11th, as suggested in your statement and that of Patricia Joos.

The notes originally submitted as supporting information to the proposed adverse action dealing with your conversation with Ms. Joos are inaccurate. In those notes which you have subsequently put in the form of a written statement, you originally indicated that Ms. Joos asked Respondent of his status for December 11th and 12th. It was obviously Ms. Burdick who spoke to Respondent. It is also obvious that your statement is reporting second or third hand information.

Your notes, and subsequently your statement, reflect that Respondent told Ms. Burdick about a dentist appointment on December 12th. In fact, as was indicated in the original response, that was not the basis for his claim for sick leave for that date. More significantly, there is nothing in Ms. Burdick's statement indicating Respondent referred to a dentist appointment in the conversation. Even Ms. Joos's subsequently obtained statement does not reflect any discussion between Respondent and Burdick concerning a dentist appointment.

At this point, Respondent is at a loss to determine the basis for the allegations contained in your original notes, now in your statement. Certainly, Respondent has not been provided with any documentation supporting the obvious second or third hand information referred to in your statement.

In summary, Respondent's discussion with Ms. Burdick concerned charges for leave during the week of December 8th through December 12th. He responded in the affirmative, referring to annual leave for December 11th. He then differentiated and specifically referred to sick leave on December 12th.

Respondent has previously answered the remainder of the information contained in the specification. It is clear from the foregoing that Respondent never directed a subordinate

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to prepare an amended time card with false information. In fact, except for the oversight which was thoroughly explained in the original submission, there is no evidence whatsoever to support the allegations in this specification. Further, before Respondent even knew that you questioned his status during that week, and when asked on January 27th, 1981, he freely indicated he was on annual leave for Thursday, December 11th, 1980. Respondent had no reason to answer falsely at that time and no reason to falsely indicate his status before that time. In fact, if as you suggest, Respondent was attempting to improperly claim regular duty status for December 11th, 1980, he would have continued to conceal his status in the conversation with you on January 27th, 1981. He had no reason to know you doubted or was challenging his status for that day.

This charge as originally made, and now as changed, is based upon misunderstanding and subsequent second and third hand recollections and reports to you of conversations.

Reason #3 has been amended or changed, primarily by the addition of allegations dealing with December 11th, 1980. In the first sentence of the original charge, you refer to a discussion with Respondent on January 27th, 1981 concerning a claim for sick leave on December 12th, 1980. That charge goes on to reflect that Patricia Joos advised you that Respondent advised her and the timekeeper to charge sick leave for December 12th, 1980. As was

indicated above, Respondent was properly on sick leave on Friday, December 12th, 1980. Contrary to the claim you made in the original charge, you now claim that the conversation with Respondent on January 27th, 1981 also involved December 11th, 1980 when no reference was made to Decembver 11th in the original charge. As Respondent previously indicated, he advised you he was on leave status on December 11th, and on sick leave for December 12th, 1980. When shown the incorrectly prepared time cards, Respondent advised you that the time card was in error.

The statements were made to you without hesitancy. As was indicated above, his statement of his status during the week of December 8th, 1980 was completely consistent with what in fact his status was. The only error on the time card was the failure to list leave for Thursday, December 11th. Respondent stated to you that the time card was in error. He did not attempt to place blame on anyone, and does not intend to do so.

Respondent initialed the time card containing the erroneous entry for December 11th, 1980 and must bear the burden of that oversight. There is nothing to support the suggestion that Respondent's conduct was more than oversight.

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Respondent made no false statement to you with respect to the entries on the time card. Rather he indicated the entries were wrong. And, he did so at a time when he had no reason to suspect an investigation.

As was indicated in the response, Respondent had no notice of the incorrect recording of his leave time as of the date of the January 27th, 1981 meeting. In fact, because his and the other amended time cards initialed that day were not processed, Respondent never received an earnings and leave statement. Once he had received an earnings and leave statement reflecting what was to be on the amended time card, Respondent would have had notice of the error on the amended time card and would have acted to

correct that error. In fact, that notice would have reached Respondent about the time of the January 27th meeting.

Because the amended time card was pulled out of the procedure. Respondent was denied that notice. Again, however, we call your attention to the fact that Respondent openly admitted his status for December 11th was annual leave and his status for December 12th was sick leave.

It is difficult to determine the multitude of sins that may fall in the category of making false statements on "government matters". It is clear that your conversation with Respondent on January 27th does not fall into that category. Respondent did not make a statement knowing it to be false or untrue. He did not make a statement intending to deceive you. Rather, the entire tenor of the conversation was honest and forthright. In fact, as we indicated at the oral presentation you complimented the Respondent on his honesty and candor when he stated that he was on annual leave for December 11th and sick leave for December 12th. There is no reason for Respondent to have denied knowing how the sick leave charge came about. As he indicated, he advised the timekeeper to note that charge. As we explained in the earlier response, Respondent initialed the changes, together with several other amended time cards. He initialed the amendments on his time card thinking they covered both instances involved. In fact, one of the amendments dealt with a brief sick leave period charged in the previous work week.

There is nothing new in the statements attached to the changed charges to support Reason #3. The change reflects Respondent spoke with Darlene Burdick about the amended time card, as Respondent indicated in his original response. The primary basis for the charge in Reason #3 appears to be a differing recollection of your conversation with Respondent on January 27th, 1981. You are now in the position, as the person receiving the oral response to make a recommendation or findings on the probative value of your own statement, which

you attach in support of the changed specifications. Aside from the due process aspects of this situation which will be discussed below, there is no other support for the charge and thus nothing further to which we must respond.

For the record we should also like to object to the attachment of and reliance upon the signed statements taken after the proceedings had been concluded and the matter should have been submitted for decision by Mr. Miles. None of the statements are sworn to, under oath, in the form of an affidavit. Information in both the Burdick and Joos statements is recited ambiguously.

While each of the statements, including your own, appears to have a notary public signature at the end, the notary public is swearing to the truth of the fact that Mr. Deitch signed as a witness. In a conversation with one of the persons giving this statement, I was advised that the person was not advised they were giving a sworn affidavit, but merely signed this statement in the presence of Norman Deitch.

I would also point out the conflict between the statements now offered and the information originally contained in your "notes". In addition, I would note the conflict between the information contained in Ms. Joos' statement and that contained in Ms. Burdick's statement.

Finally, with respect to the merits, I would call your attention to the comments made concerning the proposed penalty. There is nothing in the original notice of proposed adverse action and its supporting documentation, nor in the changed notice and its purported supporting documentation reflecting anything but an oversight by Respondent and a misunderstanding among some of the other persons involved. The allegations with respect to December 12th, 1980 are unchanged and offer no support for disciplinary action of any kind. The allegation with respect to December 11th is no better supported. Given all circumstances,

including Respondent's record, there is no disciplinary action appropriate. Certainly, any suggestion Respondent should be terminated from his position on the basis of evidence consisting of misunderstandings and second or third hand reports of information is unjustifiable.

As was indicated in the original response, Respondent had no reason to falsify or attempt to avoid claiming annual leave for December 11th, 1980. Respondent had ample annual leave leave available to him. There was no need and no benefit which Respondent gained by intentional misstatements or falsification.

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More shocking than Respondent's oversight is your entrapment or effort to mislead Respondent, as chronicled in your notes and subsequent statement. In fact, the record reflects that rather than confront Respondent, you engaged upon a long process of attempting to mislead him, unsuccessfully. For, during the conversation on January 27th, 1981, Respondent stated he was on annual leave on Thursday, December 11th and sick leave on December 12th. He did so, not knowing there was any need for concern and before you showed him the time card with the erroneous entry for December 11th.

As was explained, had you permitted the amended time card to be properly processed, Respondent would have received an earnings and leave statement with the incorrect charges for annual leave. He then would have been in a position to correct the error. Rather, you directed Respondent not to correct the amended time card. In fact, at the oral presentation, you became visibly upset or angry when you learned that Respondent was requested to resubmit the amended time cards because they had never been properly processed and did so, upon my advice.

THE PROCEDURAL IRREGULARITIES & OTHER CONDUCT DENIED RESPONDENT DUE PROCESS THROUGHOUT PROCEEDINGS IN THIS CASE.

At various points during the procedures, Respondent has voiced complaints concerning irregularities and denials of due process. He stands by those objections, as raised. It is not our purpose to reiterate all of those objections as this time. Nonetheless, because of the severity of the proposed adverse action, these irregularities and denials of process take on greater significance. For this reason, Respondent wishes to summarize some of these objections.

The first objection Respondent wishes to note concerns the precipitous manner in which the proposed adverse action came about. This was not fully apparent to Respondent until the amended or changed charges were filed in May of 1981. Throughout his review of the charges in preparation of a response, Respondent was amazed and concerned by the apparent lack of investigation and understanding of the circumstances before such serious adverse action would be proposed.

The original charges reflect that the proposed adverse action of dismissal was based upon a plan, apparently conceived by you on December 11th when you noticed Respondent walking with his sister. While your original notes attempted to chronicle a variety of investigative matters, in fact your proposed adverse action was based upon information partially provided by Patricia Joos, which was obviously hearsay, at least. Rather

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than speak to Darlene Burdick as a part of your plan and investigation you relied on misinformation and a misunderstanding of the information provided to you by Ms. Joos.

As a part of your investigation, you visited the Albany office on January 27th, 1981. You learned no "incriminating" information from Mr. Yablonski. You received and acted upon hearsay infor-

mation and your misunderstanding of information provided to you by Ms. Joos. When you asked Respondent of his status on December 11th and 12th, before suggesting any question about his status or the propriety of the amended time card, he honestly and frankly responded that he was on leave both days, that is annual leave on December 11th and sick leave on December 12th, 1980. That information was either misunderstood or intentionally overlooked. Yet, rather than confront Respondent at that time or seek further information, you proceeded to propose adverse action involving termination of Respondent.

When Respondent learned that you would be designated as the person to hear and receive the oral presentation, he objected. Respondent reiterates that objection. Respondent is entitled to a full hearing and oral presentation before a person empowered and authorized to receive the information and make a recommendation on the proposed adverse action. In effect, because an oral presentation is so important, Respondent is entitled to appear before someone who can make recommendations with respect to facts submitted in the conduct of the hearing. In the instant case, placing you in that position denied Respondent the benefits of such an oral presentation. In fact, because you were placed in that position, Respondent's counsel submitted the full oral presentation on March 24th, 1981.

The charges and facts involve disputed recollections and questions of fact. Much of the dispute or conflict arises from what were originally your notes and have later become your "written statement". At the time of the oral presentation, the substance of the information supporting the adverse action was your notes and information obtained by an investigation which you directed, reviewed and acted upon. Your recollection of the conversations of the meeting on January 27th, 1981 was an integral part of the investigation and the charge. Yet you were nonetheless put in the position of making findings of fact and recommendations based upon your own statements.

Further support for the folly of placing you in the position of hearing Respondent's oral presentation is evident from the circumstances occurring after that presentation. When it became apparent Respondent challenged your statements or recollections of his statements and challenged the nature of the investigation which you directed in the evaluation of

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the facts adduced and when it was clear that the proposed adverse action was not amply supported by the evidence submitted, you attempted to preserave your position. Although Respondent had fully responded to all of the allegations which you had made, based upon all of the information which you had received in your investigation, and although Respondent had fully proceeded through all of the steps provided by regulation for the determination of proposed adverse action, you elected to attempt to shore up a weak case after the case had been fully submitted to you and should then have been submitted to Mr. Miles for final decision. The actions which you took after the conclusion of the oral presentation were actions which you could have taken and should have been taken before the proposed adverse action. These very actions were the subject of complaint and criticism by Respondent in his response.

Placing you in the position to receive and make recommendations upon Respondent's oral presentation and written presentation leads to the potentially open-ended adverse action procedure which has occurred in the instant case. If there is support for the conduct which has occurred thus far, there is no reason why you cannot further amend after receipt of this written presentation.

It is not reasonable to expect that you can fairly review and make recommendations upon the issues that arise in this case because you are an integral part of those issues and the conflicts. Respondent certainly cannot fairly expect an impartial and unbiased decision. Notwithstanding the fact that your recommendation be passed on to Mr. Miles, the conduct of the oral presenta-

tion before you and the submission of the additional written answer to you at this time makes a mockery of the entire response procedure.

Due process is further violated by procedure which permits the amendment of charges after the matter has been fully responded to and submitted to the last step of the responsive procedure. While there may be suggestions in the opinion of other cases with respect to an agency's right to amend charges subsequent to their initially being filed, doing so as in the instant case violates due process. There is no fundamental fairness provided Respondent where the charges may be amended after he has fully responded to the original charge. This is particularly true where the person in control of the charges, and the review of the original charges, as well as the amendment process, is the person receiving the response.

After Respondent submitted his oral presentation, he later learned of a plan to take further statements from employees

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involved. When he learned of that we voiced our strong objections to doing so at that time. We indicated that charges were already responded to fully. There was no authority for the taking of additional statements once the charge was made. In fact, the authorities reflect that before adverse action is taken, the investigation and determination of adequate support for the charges must have occurred. Nonetheless, in response to the objections voiced in my letter of May 8th, 1981 I received a letter dated June 4th, 1981. The letter of June 4th, 1981 was apparently written after you in fact amended the original notice of proposed adverse action. The letter I received from John Miles, dated June 4th, 1981 in effect concedes one of the complaints originally made by Respoondent, that is, that the record was not clear and there was not adequate support for the proposed adverse action. Further, Mr. Miles' letter clearly indicates he directed that you obtain *affidavits* from key personnel, which was not done. He indicates that he directed

these affidavits be obtained in order to clarify the events referred to in the original proposal of adverse action. Rather, you amended the adverse action, changing the substance of three of the four specifications. This was based upon the fact that Respondent called to your attention the apparent limitation of the specifications as originally drafted.

Uniquely, when the proposed adverse action was amended by letter dated May 29th, 1981, you saw fit to serve a copy of it on Respondent by mailing it only to his home address. You were aware of the fact that he returns home only on alternative weekends, at the earliest. You knew his location in Albany and was able to contact him whenever necessary at that location. You knew of my appearance on behalf of Mr. Schwender. Nonetheless, I was never provided with a copy of the amended notice of proposed adverse action. Mr. Schwender was sent a copy only at his home. In fact, although that copy was sent by registered mail, it was received and signed for by Respondent's neighbor, prior to the date on which Respondent actually received it.

Mr. Miles made no reference to the amended adverse action in his letter to me dated June 4th, 1981, five days after you had apparently mailed the amended proposed adverse action to Mr. Schwender. In fact, Mr. Miles' letter to me makes no mention of an amended proposal of adverse action. As is indicated above, it merely referred to my objections with respect to re-opening the proceedings by taking statements from additional personnel.

Respondent objects to the reference and effort to use an earlier determination in connection with different charges in the instant matter. It is clear that the charge in that case is not related to the conduct alleged in the instant case. Rather, the Merit

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Systems Board rejected and found no basis for the only charge involved in that case that may be relevant here, that is falsification. Respondent submits that it is the accusation of falsification in the earlier case, which you choose to use to support the instant, obvi-

ously weak case. Respondent further submits that he is entitled to specifications as to how, if at all, a decision of the Board in the earlier case supports the charges and/or the proposed penalty in the instant case. Without knowing how you propose to use it, or how it may be considered, Respondent is unable to fully and fairly respond to this information.

In addition to the fact that your status as accuser and investigator makes it impossible for you fairly to receive and make recommendations upon Respondent's written and oral response, the conduct outlined in your notes reflects a further denial of due process. As is discussed above, it was apparent from the very first date, December 11th, 1980, that you set about to entrap Respondent rather than confront and correct him, if such were necessary. Thus, every incident reflected in your notes, is a part of the scheme to conceal something from Respondent, to see if you could entrap him. In fact, you could not do so. Nonetheless, with no support by way of written statements, or affidavits, and conflicting or ambiguous hearsay statements, you proposed removal of Respondent on February 11th, 1981. Your part and apparent control of this scheme, makes it more abundantly clear you could not, and should not have been placed in the position of receiving and making recommendations on the response in this case.

CONCLUSION

For the foregoing reasons, Respondent reiterates and re-urges that the charges be dismissed in their entirety. There is no basis to support the accusation that Respondent falsified an amended time card by "covering his duty status on December 11th and 12th; that he directed a subordinate to prepare an amended time card based upon false information or that he made a false statement on a 'government' matter." Rather, the record reflects an effort at entrapping and harassing Respondent based upon a misunderstanding or misinformation.

I assume the procedure followed in connection with the original submission will be followed in the instant case. Thus, I trust you will forward this response to Mr. Miles after you have reviewed it.

Very truly yours,
LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
By: [Signature]
Carmin R. Putrino

CRP:em

charge of that office and all the employees there in that office work for him. You know, he is their supervisor and in direct line of authority, and to have such an investigation going on and such things going on, you know, is very serious, and I did not want to get any more employees in that office involved than was absolutely necessary. This is not good to have this kind of thing, you know, surfaced in an existing office.

Q. So, what did you do next after you visited the Albany Office?

A. I returned to my office in New York.

Q. And what, if any action did you take relative to Mr. Schwender?

A. After putting together, you know, my report and thinking about it and contemplating, and you know, talking, you know, with my advisor and so forth, and I then prepared an adverse action.

Q. All right. Now, you also heard Mr. Schwender's oral presentation, didn't you?

A. That's correct.

Q. Okay. After you heard the oral presentation, did you make a recommendation to Mr. Miles?

A. Yes, I did.

Q. And can you tell us what that recommendation was?

A. I made an oral recommendation, and forwarded it to Mr. Miles, a transcript of the oral presentation along with the written presentation and discussed it with him, you know, my recommendation was for, you know, was for sustaining the charges, that it was quite clear to me that he told me that he should have been on

annual leave, and I saw nothing other than a changing of that story, saw nothing other than a fabrication in the case, that is what I saw; made recommendation to Mr. Miles based on the record and information available and recommended that the charges should be sustained.

Q. All right. A time came when some further investigation was done?

A. Yes.

Q. How did that come about?

A. That came about basically at the request of Mr. Miles, through the advice and counsel of advisory people involved in the case.

MR. PUTRINO: I didn't hear that.

THE WITNESS: Through advice of others, you know, four administrative people and personnel

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results. He really did say that several times.

BY MR. PUTRINO:

Q. Is that your understanding?

A. That's correct.

Q. Did you ever notify Mr. Schwender what his leave status was to be?

A. No, I did not.

Q. You never told him what you considered his leave status so he could amend his time card?

A. No.

Q. Why not?

A. Because we were waiting for the processing to get through. There is a process that would determine whether those days are annual. This process would determine whether or not he properly

recorded time on his time cards and if it is determined that he did, then the final accounting for the employee, a new card will be submitted, as amended, to me, showing him, AWOL, annual leave or sick leave.

Q. And those are cumulative, they are —

A. They are never accumulative, unless something else changes. If something is not appropriately reflected on the time card, he has to submit an amended time card showing, I guess, annual

leave status on Thursday and sick leave status on Friday. If this good body determines that that is correct, it will so stay that way. If not, it was presumptuous of me to put AWOL status until the proceeding is completed.

Q. You told us that Mr. Miles asked you for a recommendation, or you made a recommendation, I should say; is that correct?

A. That's correct.

Q. You made it on both occasions, originally and secondly?

A. Yes.

Q. You transmitted to Mr. Miles a transcript of the original presentation where I and Mr. Schwender appeared before you?

A. That's correct.

Q. You made a recommendation to Mr. Miles?

A. That's correct.

Q. You made a recommendation in writing, the first one?

A. I did not.

Q. Your first recommendation to Mr. Miles was to sustain the charge; is that correct?

A. That's correct.

Q. Was there any discussion at length about your recommendation?

A. Some discussion at length, but he was still in the process of getting a transcript in the proceedings.

Q. I thought you told us you gave it to him already?

A. I gave it to him, that's right. He was still in the process of reading it.

Q. Do you recall any of this discussion when the first recommendation took place; do you remember the date?

A. No recollection at all.

Q. Do you recall where it took place?

A. On the telephone.

Q. You talked to him on the telephone?

A. It was.

Q. Do you recall what you discussed the first time around, your recommendation?

A. The first discussion I had with him, after the oral presentation, I began to advise him that a record was being developed, how long it would be before the transcript was in, and that he was to receive the written comments, and it was a separate, that you

didn't bring those alone, and upon completion of that and review, I would discuss it with him further and we had several discussions on the issue.

Q. Did you discuss the first, first proposed adverse action recommendation?

A. Yes.

Q. With Mr. Miles?

A. Yes.

Q. Any recommendations that day?

A. Yes.

Q. What was the occasion of the second discussion, whenever that was?

A. Basically discussed, after he had a chance to receive the information and review it, and so forth, it was discussed in detail.

Q. What did he ask you and what did you say to him?

A. Basically —

Q. Just tell us, if you can, what he said.

A. Basically I told him that the charges should be sustained. He had some — he raised questions. We discussed it back and forth.

Q. What were the questions?

A. Questions as to the clarification that was

subsequently done, and you know, obtaining the statement from the two people involved.

Q. Uh huh, and then did you discuss recommendations again, that second time?

A. After the second — yes.

Q. When did you do that?

A. I don't recall specific dates, but again, it would have been several different conversations.

Q. On the telephone?

A. On the telephone.

Q. Can you tell us what your recommendations were in these conversations?

A. Yes. Basically, again, it was that the charges should be sustained.

Q. Did you tell him why?

A. I told him — yes. I told him why, and the relationship to what the record held.

Q. What were his comments or questions to you?

A. At the second round?

Q. That's right.

A. Not having additional questions of any significance that I recall.

Q. He did not? He was just listening to what you had to tell him?

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A. Back and forth discussions and the statement that was obtained.

Q. If it was back and forth, what was his side of the back and forth?

A. Again, best as I can recall, discussion of the statement and discussion of the amendment and clarification that took place and, you know, the discussion relative to the written presentation you submitted and points that were there, and discussion relative; I felt, still, that the charges should be sustained.

Q. Were there any discussions about the prior adverse action in 1978?

A. I don't — I don't specifically recall whether we discussed it or not. It was part of the record.

Q. Okay. Was there any discussion about Mr. Schwender's late submitting of the second amended time card in March of 1981?

A. Not nothing more in addition, what is the record, and the fact that we had discussion about that particular portion.

Q. I'm sorry?

A. That particular portion, of your presentation,

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his submittal of a new amended time card.

Q. So, there was discussion about that?

A. Sure.

Q. Did he ask you your opinion about the facts of that?

A. Not that I recall, anything specific other than, again, my discussion of the case was more from my side, than it was from his.

Q. Mr. Clark, you indicated that there was something in Agency Exhibit 2, that establishes that Mr. Schwender would not have been entitled to administrative leave in August of 1980, when his plane was waved off to Albany because of fog. Can you direct me to anything specifically in the document?

A. Definitions in the very first page, paragraph on the right-hand side, I believe it is, that describes the emergency leave kind of situation. It describes there, basically situations that involves the shut — you know, a lot of people, it is not singularly directed and you know —

Q. As you understand it, does that mean that weather conditions such as fog, would not be an emergency situation?

A. I have never heard of any federal building or any federal office being closed because of fog.

Q. How about people delayed in getting to work because of fog?

A. I have never heard — you know, if that is the case, you know, there is a mechanism established to allow for administrative time when that, you know, when this is to be done. There is a mechanism established in most areas, and it is done through the Federal Executive Board. You know, it is done through a radio announcement, and provided for in a liberal leave policies and so forth.

Q. So that I understand, then, your opinion with respect to whether Mr. Schwender would have been entitled to administrative leave is based on the definition of the emergency as found on the first page; is that right?

A. And my knowledge relative to federal personnel procedures, having worked for the government 15 years. I do not have authority to, myself, grant anybody administrative leave. In my office, for example, that is done through a different mechanism, it is done through the Federal Executive Board. Major cities have mechanisms that establishes when an administrative leave is given for, for example, weather.

Q. Does Mr. Schwender, as Executive Director at

A. No, I don't think so.

Q. Did you learn anything else from Mr. Deitch, that he learned from Miss Burdick, that was not included in your summary?

A. Not that I recall.

MR. RIOTTO: Off the record.

(Discussion off the record.)

MR. RIOTTO: On the record.

BY MR. PUTRINO:

Q. Mr. Clark, in your discussions with Mr. Miles, did you ever indicate to him that, indicate to him the period of time that elapsed between the time Mr. Schwender initiated the first amended time card and the time that they were brought in to him to sign?

A. I don't understand the question.

Q. Did you ever tell Mr. Miles how long it was between the time Miss Burdick asked Mr. Schwender about preparing the card and thetime when she brought the card in forhis initials and signature?

A. No, not to my knowledge.

Q. Did you know what the period of time was?

A. No.

Q. Did you ever discuss with Mr. Miles, or tell

Mr. Miles about the statements made by Mr. Schwender on January 22nd about dental problems or dental appointments?

A. I don't recall, one way or the other.

Q. You don't recall whether you told him or not?

A. I don't recall one way or the other.

Q. Did you discuss the difference between Miss Burdick's statement and Miss Joos' statement concerning what was said by Mr. Schwender on December 15th, regarding the amended card?

A. No, I don't recall. I just don't recall.

Q. Did you and Mr. Miles discuss the airline ticket that Mr. Schwender submitted with respect to his return on December 12th?

A. I don't recall.

Q. Did you and Mr. Miles discuss, did you discuss your interpretation of Mr. Schwender's submitting the second amended time card; how you felt about it?

A. Yes, I discussed how I felt about it and the response.

Q. Did you discuss it with Mr. Miles; did you tell Mr. Miles how you felt about Mr. Schwender's submitting the amended time card and second amended

time card?

A. The second amended time card; yes, we discussed that.

Q. What did you tell him, and what did he ask you?

A. Basically recommended — we discussed the issue, you know, I did direct that he not submit a time card, but that he had done it; that that issue had come up and counsel had advised Mr. Schwender to go ahead and do it, and I said nothing more at that time.

Q. Did you indicate whether you thought this was another violation; that that conduct was any separate violation?

A. No, we did not discuss that, to my recollection.

Q. And did you say that you — did you discuss in any detail, that is, anything with regard to any specificity, the prior adverse action taken in 1978?

A. The sixty day suspension?

Q. That's right.

A. We discussed it, but nothing with any specifics.

Q. What did you or he say about it?

A. It was a part of the record and that certainly had an influence as far as the overall facts.

Q. Did you tell him what influence you thought

it had?

A. Yes.

Q. What did you tell him?

A. That it had an impact, showed a pattern, showed, you know, continuation and he didn't larn a lesson from the first time, and here is another example of an employee using improper judgement, decisions.

Q. That is what you told him?

A. That's correct.

Q. What did he say?

A. I don't recall.

Q. Did you and Mr. Miles discuss Mr. Schwender's credibility or believeability?

A. I don't recall.

Q. Did you and Mr. Miles discuss what kind of disciplinary action was taken in connection with similar cases or similar charges?

A. I do not recall.

Q. Did you ever bring to his attention or mention any action that was taken in other cases involving other people dealing with similar charges?

A. No, I don't recall.

Q. Did he ever discuss such examples with you;

Director of Field Coordination?

A. Four, I believe.

Q. How many of those cases involved proposal of removal?

A. Three.

Q. And those four, or three include Mr. Schwender's case and the case that you testified about that was settled?

A. Yes.

Q. During the course of — strike that. When was the first time you were aware of the adverse action proposed against Mr. Schwender?

A. You want the adverse action or an investigation?

Q. Well, anything to do with it?

A. Well, I think — I deal on a daily basis with the Regional Administrator, and Mr. Clark called me in January sometime and said that he was going to Albany to investigate a case that he had up there that involved the Area Director.

Q. Did you subsequently learn any more about what he found in the investigation?

A. I think before the charges were finally prepared or something, we did discuss it.

Q. Did he tell you what he suspected or what he was investigating?

A. I think he did say, some problems about time cards or something like that.

Q. And did you have any other conversation after that, but before these charges were drawn, that it was as specific as that; you know, that mentioned Mr. Schwender or the charge?

A. I don't recall any, that I can remember.

Q. You received a copy of the proposed adverse action; is that correct; the notice of charges?

A. Yes.

Q. Then you received, you or your office made arrangements for the receipt of the oral presentation and the written response; is that correct?

A. Yes. I did.

Q. Did you discuss with Mr. Clark any of the requests that I made on Mr. Schwender's behalf, before the oral presentation; specifically requests with respect to extension of time or who the oral presentation should be made to?

A. The extensions, I don't recall that, even discussing those with him. The oral presentation, something may have come up about that, although I

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A. I remember your responses. I don't remember Mr. Clark's responses at that time.

Q. No, I am saying, Mr. Clark forwarded to you my responses?

A. Yes, he did.

Q. And he also discussed and made recommendations on sick time?

A. We discussed the case, yes, and he made recommendations?

Q. He made recommendations?

A. Yes.

Q. By the time the second proposal of adverse action, you knew that there was a credibility question in dispute, because of our oral presentation and our written response; isn't that correct?

A. Yes.

Q. Did you take that into consideration in deciding whether Mr. Clark should receive the second response?

A. Do you mean, did I take it, whether he ought to be the one that receives it?

Q. Right.

A. Again, Idid not see a conflict because he was taking the response, to hear the case as my

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representative, and be able in the case; but, the records, to me, I as if I was there.

Q. He was supposed to make recommendations to you, was he not?

A. He makes recommendations to me of what he finds. I don't have to abide by it, but he is supposed to make recommendations.

Q. He is also supposed to take a part in asking questions, for example?

A. He can take a part, yes.

Q. He can also take part in possible mitigating circumstances or explanations that might result in a lesser penalty?

A. He can clarify, yes.

Q. What was your reason in asking Mr. Clark to prepare the second charges or amended charges and investigate further?

A. There again, in the oral presentation and written presentation which you sent me, they raised some questions as to the credibility, one, of some of the statements that were made in previous charges, and things that were, that certain employees had told us that you, that in your estimate, provided statements from one of the secretaries or something,

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that seemed somewhat in conflict with that. I wanted to clarify that and take affidavits so I could know, as I say, what the facts are in the case.

Q. Did you review the second charges, as I have been calling them?

A. Yes.

Q. Did you know that the second charges contained references to December 11, certain charges where they did not contain those references in the original charge?

A. I believe there were small changes, I think, that did not affect the facts of the situation of the charges.

Q. As a matter of fact, Mr. Miles, there was a claim in reason two that Mr. Schwender directed an employee to prepare a false time card with respect to December 11th, when that was never included in the first charge; isn't that right?

A. I think it was Pat Joos was mentioned in the first one, and I think in this one it was changed and Diane Burdick.

Q. There was no reference to December 11 in the first charge, reason two, and there was in the second charge, reason two; isn't that correct?

A. I'd have to review them. Again, I think there was —

Q. Is December 11th mentioned there in the second charge?

A. Yes.

Q. And in the first charge?

A. I don't believe it was in the first charge.

MS. CRONAN: I object to asking this witness what is contained in a letter that is in the record. The letter speaks for itself.

MR. RIOTTO: Well, it does. You can tell him. As a matter of fact, if you want him to explain it?

MR. PUTRINO: Okay.

BY MR. PUTRINO:

Q. And again, Mr. Miles, the first charge, reason three contains no reference to December 11th. The second charge, reason three, does contain reference to December 11th. Did you discuss that with Mr. Clark, the fact that there were additional days being added to the charge?

A. I still think that just to clarify the charge and clarify what was there and again I didn'- believe it was affecting Mr. Schwender's due process

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because you had the right to another oral response and written response, which you did take opportunity to respond to.

Q. Did you review the oral response, that is the transcript of the oral response before you asked Mr. Clark to reinvestigate?

A. Yes, I read the oral response and I read your written response.

Q. So, your decision to reinvestigate occurred sometime after the oral response was prepared by the Court Reporter and submitted to you; is that correct?

A. Yes.

Q. Do you recall when that was, that is when you directed that?

A. No, I don't.

Q. Directed a second charge, or investigation?

A. No, I don't recall the date.

Q. Now, you issued a decision on July 31st in this case, Mr. Miles.

A. Yes.

Q. Would it be fair to say that in deciding, in reaching that decision, you considered both Mr. Schwender's original response and his second response?

A. Yes.

Q. Did you prepare the decision yourself, that is dictate it yourself or did you review it after someone else prepared it for you?

A. Well, I work in conjunction with the staff preparing it, and then reviewed it and finally signed it myself.

Q. In reviewing your written decision, Mr. Miles, I am puzzled by a discussion of some length concerning statements made to Miss Joos and Miss Burdick which don't relate to reason one, and I was wondering; do you have a copy there with you?

A. No, I don't.

MR. RIOTTO: They can provide him with a copy, I am sure. Would you tell us what the page is you had in mind? It is pretty voluminous.

BY MR. PUTRINO:

Q. First of all, Mr. Miles, I am dealing with reason one and reason one is spelled out on the first page "A falsification appeared in the time cards for December 11th and 12th"; do you see that?

A. That is exactly right.

Q. On page two in the second paragraph, or the first full paragraph, there is the sentence about five

MR. PUTRINO: This goes to our motion.

MR. RIOTTO: Well, your point was that they should not have allowed Mr. Clark to be the recipient of the reply, but Mr. Miles did explain why he made that decision, so I think it has been discussed.

BY MR. PUTRINO:

Q. Mr. Miles, did you discuss with Mr. Clark the fact that Mr. Schwender had submitted a second amended time card in March, 1981?

A. I didn't become aware of that in the oral presentation.

Q. At any time after the oral presentation and before you made your final decision, did Mr. Clark ever discuss with you how he interpreted Mr. Schwender's action in submitting a second amended proposal?

A. Yes.

Q. What did he tell you?

A. Again, that went on the credibility of the seriousness of the charge, of a person in management's role in an area office would be actually insubordinate, and here he is responsible for the area office and many people there; yet he chooses to base his decision on what his private attorney has to say, in an internal matter of an agency; was a

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A. I was an area director in Buffalo from November of '75 until December '78 when I was inter-stationed transferred to Albany with David Bernard, who was transferred to Buffalo.

Q. And then as an area director you are responsible for running the particular area office; is that correct?

A. Yes, sir.

Q. Is there any difference in the terms of the number of employees between the Buffalo area office and the Albany area office?

A. No, sir, not basically. Give or take one employee or two.

Q. Were the office procedures that were followed in the Albany office the same or similar as those in the Buffalo office?

A. Basically the same, yes, sir.

Q. When you went to the Albany office was Mr. Bernard still there to familiarize you with it?

A. Yes, for one week.

Q. Now, when you were transferred to Albany, Mr. Schwender, did you maintain your residence in Buffalo?

A. Yes, sir.

Q. Why did you do that?

A. My wife is a career tenured teacher in a local

Respectfully submitted,

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No. 85-346

In the Supreme Court of the United States

OCTOBER TERM, 1985

P. CHARLES SCHWENDER, PETITIONER

v.

DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the proceedings leading to petitioner's discharge from the Occupational Safety and Health Administration were procedurally defective.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A48-A49) is reported at 770 F.2d 178 (Table). The opinion of the Merit Systems Protection Board (Pet. App. A43-A46), the opinion of the New York Regional Office of the Merit Systems Protection Board (Pet. App. A24-A42), and the opinion of the Department of Labor deciding official (Pet. App. A5-A22) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1985. On June 25, 1985, the Chief Justice extended the time to file a petition for a writ of certiorari to and including August 27, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner P. Charles Schwender is a former employee of the Occupational Safety and Health Administration (OSHA), where he held the position of Safety and Health Manager in the Albany, New York, area. On December 8-10, 1980, petitioner attended an OSHA Area Directors conference in New York City. After the conference ended, petitioner remained in New York City for two days for the purpose of sightseeing. On December 11, petitioner was spotted by OSHA Regional Administrator Roger Clark, one of petitioner's superiors. When petitioner returned to his office on December 15, he instructed the office timekeeper to record that he had not taken annual or sick leave on December 11, but had taken eight hours of sick leave on December 12. Petitioner's time card came to Clark's attention two weeks later. Remembering that he had seen petitioner in New York City on December 11, Clark went to Albany to investigate the matter. When Clark asked petitioner about the discrepancy, petitioner replied that he had been sightseeing in New York on December 11-12, that he should have taken annual leave for those days, and that he did not know why his time card was in error. However, petitioner's explanation was contradicted by other employees, including the timekeeper, who related petitioner's instructions as to how his time card should be filled out. Pet. App. A6-A12, A17-A18, A27-A30.

On February 11, 1981, Clark sent petitioner a formal notice proposing to remove him from his position with OSHA on the grounds that he had falsified his timecard, instructed a subordinate to prepare a false timecard, and made false statements to Clark regarding the timecard. Pet. App. A50-A54. The proposed notice advised petitioner of his right to make an oral and written reply to the charges. *Id.* at A52-A53. Clark was designated as the OSHA official who was to receive petitioner's oral reply, and John Miles,

an OSHA Field Coordinator and a supervisor of petitioner's, was designated as the deciding official. See 5 C.F.R. 752.404(c)(2). On March 23, petitioner submitted a 16-page written response to Clark's charges that contained a point-by-point denial of each charge, a procedural objection to the designation of Clark as the oral reply official, and the allegation that there had been "an apparent lack of investigation" of the case (Pet. App. A56). The following day, petitioner, accompanied by counsel, gave his oral reply to the charge before Clark. Petitioner's counsel also identified what he believed were errors or misunderstandings on Clark's part and articulated several bases for challenging Clark's credibility. Petitioner's reply was transcribed in full by a court reporter, and the transcript was later forwarded to the deciding official (*id.* at A77-A99).

Thereafter, the deciding official directed Clark to conduct a further investigation in order to clarify the record (Pet. App. A24, A106). Clark did so and later amended his notice of proposed adverse action (*id.* at A5, A24-A25, A102-A105). Petitioner then replied in writing to the amended notice (*id.* at A5, A27, A108-A124), and the deciding official issued his decision to remove petitioner effective August 3, 1981 (*id.* at A5-A22).

2. Petitioner appealed to the New York Office of the Merit Systems Protection Board (MSPB). After a hearing, the Board's presiding official found that the evidence supported the charges (Pet. App. A24-A42). In so ruling, the presiding official also rejected petitioner's contentions that he had been prejudiced by the designation of Clark as the oral reply official and by allegedly improper ex parte contacts between Clark and the deciding official (*id.* at A34-A37). The presiding official found no evidence showing that Clark was biased against petitioner or that petitioner had been denied a fair opportunity to present his case, particularly since Clark was merely the proposing, not

the deciding, official (*id.* at A35-A37). The presiding official also held that communications between proposing and deciding officials do not violate an employee's procedural rights (*id.* at A37).

The MSPB thereafter denied petitioner's request to review the presiding official's decision, ruling that the agency had complied with all relevant statutory and regulatory requirements, that the presiding official's findings were supported by the evidence, and that the penalty of removal was not excessive (Pet. App. A43-A46).

3. The court of appeals affirmed in an unpublished decision (Pet. App. A48-A49). The court held that "[s]ubstantial evidence supports the board's findings that the charges against petitioner were proved by a preponderance of the evidence" and that his "allegations of procedural error [are] without legal basis" (*id.* at A49).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court of petitioner's fact-bound claims is not warranted.

Petitioner argues (Pet. 6-10) that the designation of Clark as the official who was to receive petitioner's oral reply to the charges violated due process. Petitioner contends that Clark was biased, since he had initiated the adverse personnel action, and that Clark's bias denied petitioner the opportunity to defend against the charges of misconduct. However, the presiding official found that nothing in the record supported petitioner's contention that Clark was biased (Pet. App. A36), and both the full Board and the court of appeals declined to disturb that finding (*id.* at A43-A45, A49). Petitioner also has cited no specific evidence showing that Clark was biased. Instead, petitioner relies entirely on the fact that Clark had initiated the

proceedings against him. But a majority of the Court in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), held that due process was not violated where the supervisory official who had proposed an employee's removal also served as the decisionmaker. *Id.* at 155-156 n.21 (plurality opinion); *id.* at 170 n.5 (opinion of Powell, J.); see also, *e.g.*, *DeSarno* v. *Department of Commerce*, 761 F.2d 657, 660 (Fed. Cir. 1985).[1] It necessarily follows that there is no procedural infirmity in allowing the proponent of an adverse personnel action to serve merely as the recipient of an employee's oral reply and to make a recommendation as to the appropriate final decision, where the final decision whether to discharge the employee rests in the hands of a different official.

In addition, petitioner filed written objections to both the initial and the amended notices of adverse personnel action, and he has not identified any defense that he was unable to present in those objections. A transcript of petitioner's oral reply was sent to the deciding official (Miles), which gave him an opportunity to evaluate petitioner's claim that Clark should not be believed. Finally, the presiding official's decision demonstrates that he carefully considered all of the evidence and conducted a full, independent, and impartial review of the charges. Petitioner's fact-bound claim lacks merit and warrants no further review.[2]

---

[1]Justice White would have required the proponent of charges against an employee to be replaced as the initial decisionmaker only where "the hearing official was the object of slander that was the basis for the employee's proposed discharge" because, in that situation, "the hearing examiner's own reputation, as well as the efficiency of the service, [is] at stake" (416 U.S. at 199). The situation here is not remotely similar to that one.

[2]With one exception, every decision of this Court cited by petitioner (Pet. 9-10) to support his claim was also cited by Justice White in his separate opinion in *Arnett* (416 U.S. at 198). The only exception, *Taylor* v. *Hayes*, 418 U.S. 488 (1974), involved criminal contempt and did not purport to overrule *Arnett*.

Petitioner also claims (Pet. 10-16) that he was prejudiced by allegedly improper ex parte communications between Clark and the deciding official. However, communication between proposing and deciding officials is not prohibited in the absence of an express statute or regulation forbidding such conduct. *DeSarno* v. *Department of Commerce*, 761 F.2d at 659-661; *Welcker* v. *United States*, 752 F.2d 1577, 1582-1583 (Fed. Cir. 1985); *Depte* v. *United States*, 715 F.2d 1481, 1484 (Fed. Cir. 1983). No statute or regulation forbids such communications in this situation. On the contrary, the oral reply official must offer a recommendation to the deciding official; in fact, the same individual may serve as both the proposing and deciding official. See 5 C.F.R. 752.404(c)(2); *Arnett*, 416 U.S. at 155-156 n.21 (plurality opinion); *id.* at 170 n.5 (opinion of Powell, J.).[3] Petitioner's claim of prejudice also lacks any foundation in the record. Petitioner has not identified any information that Clark allegedly conveyed to the deciding official that was not known to petitioner beforehand; rather, petitioner's claim appears to rest entirely (Pet. 12) on Clark's inability to recall whether he had informed the deciding official of facts alleged by petitioner to support his defense to the charges. But these facts had already been presented to the deciding

---

[3]Petitioner erroneously asserts (Pet. 13-15) that the court of appeals' decision in this case conflicts with its earlier rulings in *Sullivan* v. *Department of the Navy*, 720 F.2d 1266 (Fed. Cir. 1983); *Ryder* v. *United States*, 585 F.2d 482 (Ct. Cl. 1978); and *Camero* v. *United States*, 375 F.2d 777 (Ct. Cl. 1967). The court of appeals has explained that *Camero* and *Ryder* both involved trial-type adversarial proceedings provided by agency regulations that have no counterpart here (see *DeSarno*, 761 F.2d at 661; *Welcker*, 752 F.2d at 1582-1583), and in *Sullivan* "the whole structure of th[e] employee-removal system precluded such communications" (*Welcker*, 752 F.2d at 1583 n.3). In any event, any alleged intracircuit conflict is for the court of appeals, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

official in petitioner's two written responses (Pet. App. A55-A76, A108-A124), and petitioner does not claim that the deciding official failed to consider his defenses.

Finally, petitioner maintains (Pet. 16-19) that this case provides a suitable vehicle for the Court to set forth definite procedures for a pretermination hearing for public employees. To the extent that petitioner's argument rests on the premise that the procedures followed in his case were defective, that claim must fail for the reasons given above. *Cleveland Bd. of Educ.* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985), also does not support petitioner's argument. *Loudermill* explained that "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Slip op. 12. Petitioner clearly received everything that is required by *Loudermill* and more. Petitioner was twice given written notice explaining the charges against him in detail (Pet. App. A50-A54, A102-A105; see 5 U.S.C. 7513(b)(1); 5 C.F.R. 752.404(a) and (b)), and he was given the opportunity to respond both orally and in writing to each set of charges (Pet. App. A54, A105; see 5 U.S.C. 7513(b)(2); 5 C.F.R. 752.404(a) and (b)). Nothing in *Loudermill* suggests that due process requires more than the Civil Service Reform Act of 1978, 5 U.S.C. (& Supp. II) 7501-7543, or its implementing regulations provide. See *DeSarno*, 761 F.2d at 660.

In sum, four separate reviewing authorities have found that petitioner's dismissal was justified. His fact-bound arguments deserve no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF IN SUPPORT OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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PRELIMINARY STATEMENT

This reply brief is submitted on behalf of petitioner to address respondent's argument (at page 5 of brief for the respondent in opposition) that due process does not require that the deciding official be someone other than the official who proposed the employee's removal.

POINT I

THE GOVERNMENT'S RELIANCE ON DeSARNO v. DEPARTMENT OF COMMERCE IS MISPLACED AND ITS INTERPRETATION OF ARNETT v. KENNEDY IS ERRONEOUS

Respondent's citation of *DeSarno v. Department of Commerce,* 761 F.2d 657 (Fed. Cir. 1985), discloses a fundamental misunderstanding of the basis for petitioner's claim that his due process rights were violated by the Agency's pretermination procedures. The holding in *DeSarno* was, simply, that "[a]t the pretermination stage, it is not a violation of due process when the proposing and deciding roles are performed by the same person." *Id.* 761 F.2d at 660. This is clearly a different situation from that confronting petitioner at the pretermination stage herein.

In *DeSarno,* although the deciding official had indeed "proposed" the charges — at least in the sense of having them drafted and served — he had not been an eyewitness to any of the material occurrences underlying the charges, as had Roger Clark in this case. He had not conducted any of the investigative work to gather evidence in support of the charges, as had Clark; as far as the Court of Appeals' opinion shows, he had not had any conversations with the accused employees which later formed the basis for several of the charges against them, as had Clark; and, most importantly, his credibility was not placed directly in issue by the accused employees in their defense to the charges, as was Clark's in this case.

In *DeSarno,* the initial investigation of the accused

employees had been conducted by their second line supervisor, while the chief witness against them was a co-employee. The deciding official, who also personally received their oral reply, had played neither of these roles at the pretermination stage. There was, therefore, no reason for the Court of Appeals to assume that he had a compelling personal interest in the outcome of the proposed removal. Unlike Roger Clark, the deciding official in *DeSarno* faced no challenges to his competence, credibility, or integrity in the course of receiving the employees' oral reply or in weighing the merits of the charges.

Perhaps it is accurate to say, as the Court of Appeals observed in *DeSarno*, that "[t]he law does not presume that a supervisor who proposes to remove an employee is incapable of changing his or her mind upon hearing the employee's side of the case." 761 F.2d at 660, *supra*. Here, however, it was hardly possible for petitioner even to get his side of the story *heard* by the deciding official (other than through petitioner's written responses) — much less to get him to change his mind — since the Agency had interposed petitioner's adversary, Roger Clark, as the oral reply officer between petitioner and the deciding official. The view of the evidence received by the deciding official was Clark's; the credibility recommendations made to the deciding official were Clark's; and the omissions in the evidence presented to the deciding official were Clark's — omissions which, it is fair to assume, influenced the deciding official's decision to remove petitioner from the Federal service.

At the Merit Systems Protection Board hearing, John B. Miles, the Agency's deciding official, was asked

whether his assessment of petitioner's credibility might have been different, had certain matters raised in the charges been explained to his satisfaction. One of them, for example, was whether petitioner had told Roger Clark, during Clark's investigative interview with petitioner on January 27, 1981, that he had been suffering from dental pain on December 12, 1980, thus explaining why his timecard for that date showed eight hours of sick leave. Clark had maintained, in the specifications supporting the charges, that petitioner told him he should have taken annual leave that day (A-50, A-103)*. Petitioner challenged Clark's recollection on this point, however, maintaining in his oral and written replies that he had explained to Clark at the investigative interview why he had taken sick leave on December 12, 1980, i.e., because of his dental pain (A-66; A-84; A-87; A-113).

Yet, despite petitioner's repeated emphasis on this credibility issue, at the Merit Systems Protection Board hearing Clark could not recall whether he had ever discussed with Miles, the deciding official, petitioner's statements to Clark on January 27, 1981 about his dental pain (A-133). Ironically — and tragically, as it turned out for petitioner — Clark admitted at the Merit Systems Protection Board hearing that petitioner had indeed mentioned his dental pain during the investigative interview:

> A. You know, he did tell me about his teeth. He did say that he had thought about having a dentist appointment ***. Because, I said "You left the impression that you had a dentist appointment, possibly, and then you

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* Numbers in parenthesis preceded by an "A" refer to pages of the Appendix previously submitted to the Court with the Petition.

come back with eight hours sick leave for Friday." (B-1)*.

On cross-examination, Clark's recollection of petitioner's remarks was even clearer:

A. As a result of me asking why his amended time card showed him being on sick leave status on Friday; he simply volunteered that while he was thinking about going to the dentist or thought he might have a dental appointment and thought he might be there; then he continued to go and say that he had been having some problems with his teeth and some such.

Q. In the adverse action, Mr. Clark, you said that Mr. Schwender said that he was having trouble with his teeth, not dental. Do you recall whether pain in his teeth or dental appointment?

A. He may have said either one or both. I mean, we talked about it several different times.

Q. Is an employee allowed to take sick leave for dental appointment?

A. Yes.

Q. Is an employee allowed to take sick leave if he has dental pain, discomfort?

A. Yes. (B-2-3).

At the Merit Systems Protection Board hearing, Miles admitted that, had he known of Clark's recollection of this conversation, his determination of petition-

* Numbers in parenthesis preceded by a "B" refer to excerpts from the transcript of November 17, 1984 hearing before Joseph K. Riotto, Presiding Official, Merit Systems Protection Board. These excerpts are appended to this reply brief. Other pertinent excerpts from that hearing are part of the Appendix previously submitted to the Court with the Petition.

er's credibility vis-a-vis Clark's might have been different (B-5). Thus, had Clark been less concerned with his own credibility before Miles, and more concerned with making an impartial recommendation to him on the merits of the charges, the deciding official's disposition of this adverse action might well have been different.

Respondent is also mistaken in arguing that the opinions of five Justices in *Arnett v. Kennedy*, 416 U.S. 134 (1974) dispose of petitioner's due process claims. The plurality opinion, by Justice Rehnquist, did not reach the issue of the impartiality of the decision maker "in its constitutional dimension," 416 U.S. at 155-156, n.21, but held simply that the removal statute did not require the decision maker to be someone other than the proposing official. Such a holding clearly does not vitiate petitioner's due process claims in this case, since, unlike *Arnett*, they do not rest on any statutory basis but are directly presented in their constitutional dimensions. Justice Powell's opinion in *Arnett* held that due process is satisfied so long as "an impartial decision maker is provided at the post-removal hearing where the employee's claims are finally resolved," 416 U.S. at 170, n.5. However, the critical question to be decided in this case, in light of *Cleveland Board of Education v. Loudermill*, ____ U.S. ____ , 105 S.Ct. 1487 (March 19, 1985), is whether due process requires an impartial decision maker — or, at least, a prohibition on *ex parte* contacts with the decision maker by the employee's adversary — *prior* to his removal from the Federal service.

CONCLUSION

For the reasons cited in the petition, as well as the foregoing, this Court should grant the writ of certiorari to review the constitutionality of the Agency's pretermination procedures herein.

Respectfully submitted,

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APPENDIX

was his sister or not. I did, certainly, see him with a woman. It's certainly one of the world's most popular sightseeing places. Certainly, what he said relative to being sightseeing with his sister coincided with what I had seen on Thursday. You know, he did tell me about his teeth. He did say that he had thought about having a dentist appointment because I related to him, at the same time, my discussion with Pat Joos and the discussion that she said that she had with him that previous Monday, the week before that, you know, the previous Monday, December 5th, I believe that was, a week prior. I'm sorry, the previous, previous Friday; December 5th is on a Friday. Because, I said "You left the impression that you had a dentist appointment, possibly, and then you come back with eight hours sick leave for Friday."

Q. Did he say he made a mistake on the amended time card?

A. No, he did not.

Q. Did he say the timekeeper made a mistake on the amended time card?

A. No, he did not.

Q. All right. At that time did you give

meeting, okay, and I asked him then, when he told me that he returned from that meeting on Friday, I asked him what was his status on Thursday and Friday.

Q. Did he tell you what time he left New York on Friday?

A. I don't recall specifically other than it was in the afternoon sometime.

Q. And then you said you asked him what his status was?

A. That's correct.

Q. He said he should have been on annual leave both days?

A. That's correct, he said he was on annual leave both days.

Q. But you also told us that he then discussed a dental appointment and dental problems that he was having, is that correct?

A. That is after I, you know —

Q. In the same conversation?

A. That's correct.

Q. Same conversation; how did that come up?

A. As a result of me asking why his amended time card showed him being on sick leave status on Friday; he simply volunteered that while he was

thinking about going to the dentist or thought he might have a dental appointment and thought he might be there; then he continued to go and say that he had been having problems with his teeth and some such.

Q. In the adverse action, Mr. Clark you said Mr. Schwender said that he was having trouble with his teeth, not dental. Do you recall whether pain in his teeth or dental appointment?

A. He may have said either one or both. I mean, we talked about it several different times.

Q. Is an employee allowed to take sick leave for dental appointment?

A. Yes.

Q. Is an employee allowed to take sick leave if he has dental pain, discomfort?

A. Yes.

Q. And in fact you knew from looking at the original time cards, Mr. Schwender had taken some sick leave the week before; am I correct?

A. You mean the original one submitted?

Q. Yes?

A. I don't recall of seeing the original time card submitted, no.

Q. You told us you showed Mr. Schwender a copy?

and disbelieving Mr. Schwender?

A. I think that was the main thing, and then we had a statement from both, you know, and a conflict in the evidence.

Q. On this same page, Mr. Miles, you indicate you believed Mr. Clark when Mr. Clark told you that nothing was said with respect to a dental problem. Do you see that there?

A. You want to point that out?

Q. This is page five.

A. Again — sorry.

MR. RIOTTO: Well, while he is reviewing that, do you mind if I — let's go off the record.

(Discussion off the record.)

MR. RIOTTO: Back on the record.

THE WITNESS: Where are you talking about on that page?

BY MR. PUTRINO:

Q. Also reference, Mr. Miles, to the answer on page six, that same paragraph.

A. That nothing was mentioned in the discussion on January 27th with Mr. Clark about having dental problems or having pain and discomfort that day, on the day he came.

Q. Have you ever learned that Mr. Clark realized there was such a discussion —

MS. CRONAN: I object to Counsel characterizing in a hypothetical question.

MR. RIOTTO: It is a hypothetical question.

MS. CRONAN: As to facts not in evidence.

Mr. PUTRINO: It is a hypothetical only pending reading the transcript later.

BY MR. PUTRINO:

Q. If you were to learn in fact that Mr. Clark later on, or Mr. Clark suddenly recalled such a conversation of a dental problem, January 27th; would that change your mind?

A. I think that puts weight, again, on the credibility question.

Q. You do realize that Miss Joos' statement, which you choose to believe, referred to a dental appointment?

A. Yes, I think he said on the previous week that he had a dental appointment, and in Albany on the following Friday.

Q. December 12th, that we are talking about?

A. Yes.

Q. And that, again, begins to become consistent?